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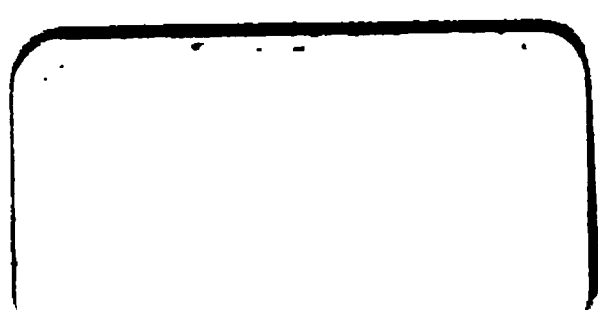
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THE
AMERICAN
AND
ENGLISH
RAILROAD CASES

EDITED BY LAWRENCE LEWIS, JR.

A COLLECTION OF ALL THE
RAILROAD CASES IN THE COURTS OF LAST RESORT IN AMERICA
AND ENGLAND

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WARASH, ST. LOUIS & PACIFIC RAILWAY COMPANY

v.

PEYTON.

(106 *Illinois Reports*, 534.)

The assessment of damages in an action on the case, for a personal injury, is a question of fact, depending on the evidence, and hence this court is prohibited from inquiring whether the damages assessed in such a case are excessive.

A railway company, by accepting and acting under its charter, becomes a carrier of persons and property, and the law imposes all the duties and liabilities of a common carrier on it, and such company can not exonerate itself from such duty and responsibility by contract with others, nor in any-wise escape or free itself from liability, unless released by the general assembly.

Where one railway company acquires the right to run its trains over a portion of the road of another company by a contract, in which it is agreed its trains, while on such leased road, shall be under the control and direction of the yard-master or other servant of the lessor company, the yard-master of the latter road, at such place and for the time being will be the servant of the lessee company, and it will become liable for an injury caused to another from the negligent acts of such yard-master, the same as if he was its own employè on its own road.

A railroad company is held to the exercise of due care for the safety of all persons while exercising its franchises, whether on its own road or on that of another company. This duty was imposed by law when it received its franchises, which holds good at all times and in all places, and if the company operates its trains over the road of another by contract or lease, it must see and know that the track is in a good and safe condition, not only for the safety of its passengers, but also for the safety of persons rightfully near to the track and liable to injury by its being used when in an unsafe condition.

Where a railroad company procures, by contract with another such company, the right of running its trains into and out of a depot over the track of the latter, it thereby makes that portion of the track so used its own, in so far that it will be responsible for all injuries resulting from negligence in keeping or permitting it to be in an unsafe condition.

In this case the defendant railway company, under an agreement with another company, had the privilege of entering and departing from the depot at a station over the track of the latter, by yielding to the latter the control of its passenger trains over that portion of the track. Under this contract the switch engine of the lessor made up the defendant's trains, and generally drew them out, but when the defendant performed that service it was under the direction of the lessor's yard-master. On the day of the accident defendant's engine backed in and was attached to the baggage car, and while detained to receive baggage some one threw a lot of loose boards on the track, between the baggage car and the coaches. After receiving the baggage the engine backed and was attached to the passenger cars, and the train moved out. In removing the boards the yard-master and his assistants left one board projecting so near the rail of the track on the left side of the engine, that it was struck by the end of the bar of the pilot, and being held down by the other boards lying on it, this board was forced around

against a high board fence and driven through it, when it struck the plaintiff, who was near the fence and not seen by the engineer, and she was injured by the dislocation of her ankle, and the breaking of her leg above the ankle: *Held*, that the defendant was liable for the injury thus caused.

In such case the court declined to say whether the lessor company was also liable, but held that if it was, the plaintiff had the option to sue either company alone, and perhaps both, as *tort feassors*, but that she was not required by any rule to sue either one instead of the other, or to sue both jointly.

APPEAL from the Appellate Court for the first district;—heard in that court on appeal from the Circuit Court of Cook county.

Messrs. Sleeper & Whiton, for appellant

Frank Baker, for appellee.

WALKER, J.—It appears that appellant's cars, by a lease or an agreement with the Chicago & Western Indiana Railroad Company, were permitted to run over a portion of the road of the Chicago & Western Indiana Railroad Company, at a station to which several railroad companies ran, and from which their trains departed. By this agreement the Chicago & Western Indiana Railroad Company retained the control of appellant's passenger trains over that portion of its track. By it the servants of the lessor directed and controlled appellant's servants and trains in coming in and going from the depot. The switch engine of the lessor, under the control of its employes, made up appellant's trains, and its engines drew them out. When appellant was permitted to perform that service it was under the direction of lessor's yard-master—this being the legal relation of the two companies by the terms of the lease or agreement entered into by them. A train of appellant, on the 10th day of September, 1881, left the depot, when the injury was received by appellee. The train which produced the injury, was, by the direction of the yard-master, placed in position for its departure; appellant's engine backed in and was attached to the baggage car, and whilst detained to receive the baggage, some one threw some loose boards on the track between the baggage car and the coaches. After receiving the baggage the engine backed, and was attached to the passenger cars, and the train moved out. In removing the boards, the yard-master and those assisting him left one board projecting so near the rail of the track on the left hand side of the engine, that it was struck by the end of the bar of the pilot, and being held down by the boards lying upon it, this board was forced around against a high board fence, and was driven through the fence, and it struck appellee, who was near the fence, and not seen by the engineer, and was so injured by the board striking her and dislocating her ankle, and her leg was broken just above the ankle. She brought suit in the Circuit Court of Cook county, and recovered a judgment against the company for \$2,500. The company appealed to the appellate

court for the first district, where the judgment was affirmed, and the case is brought to this court.

Appellant insists that the injury was the result of accident, and not of negligence. The jury, and the appellate court, have found against this position. Whether it was caused by accident or negligence was a controverted fact, which we have been positively prohibited by statute from reviewing in this court in this class of cases. This has been so often repeated that it would seem to be an act of supererogation to repeat it here.

It is next insisted that the action, if any can be maintained, is against the Chicago & Western Indiana Railroad Company, and not against appellant. We shall consider this point with the fourth of appellant's points.

It is likewise insisted that the damages are excessive. Appellant refers to no text-book or reported case which holds that the assessment of damages is a question of law. On the other hand, by every rule of law it must be considered a question of fact. It is averred as a fact in the declaration. It is traversed as a fact, and never questioned by demurrer. On the trial damages are proved by evidence, and they are found by the jury, and not by the court. The proposition seems so obvious that it should not require the decision of a court to establish the proposition. Before the statute of our legislature conferred the power on this court to review the facts in cases brought here for decision, the courts, neither in England nor this country, ever exercised the jurisdiction to examine and assess the damages, or to balance the evidence, to ascertain whether they were correctly assessed. In this class of cases, where the action sounds in damages, the court rarely ever interfered with their assessment. That is within the province of the jury. It was in cases only where it was manifest the jury had acted under the influence of passion, prejudice, or some other improper motive, that the court would interfere to disturb the finding of damages. The rules by which damages in many cases shall be measured, are questions of law, and in such cases the court, when asked, is bound to instruct the jury as to the rule for their measurement, but it is the province of the jury to apply the rule and fix the amount. If the trial court were, in such cases, to instruct the jury as to the sum they should find as damages, it is not believed that any one in the profession could be found to contend that the instruction was correct; and by what statute or rule of practice can we examine the evidence and determine whether the damages are excessive? That power was taken from this court when we were deprived of the power to consider controverted facts.

We now come to the consideration of the important and controlling question of the case, and that is, whether appellant is freed from liability by placing, by the lease or agreement, its employés

and trains, at the place where the injury occurred, under the control of the road-master of the other road. Appellant did so as a matter of interest or choice, and not from overpowering necessity. When the charter was granted the corporation became a carrier of persons and property, and the law imposed the duty of common carrier, with all the liabilities incident to the occupation, and the responsibility was assumed by the corporation, and imposed on it by the law. Nor can the corporation exonerate itself from the duty and responsibility by contract with others, nor in anywise escape or free itself from the liability, unless released by the general assembly. Appellant voluntarily placed its engines and cars, at that place, under the control and direction of the employés of the other road, and for the time being, and for that purpose, the road-master of the other road became the servant of appellant. The engine and train belonged to appellant; the engine-driver, the fireman, the conductor and brakeman on board of the train were its servants, under its control, and the yard-master, under the agreement, *pro hac vice*, for the time and place, was its servant. Had the agreement not been made he would not have controlled the starting of the train. Appellant, by the agreement, authorized him to act as its yard-master, and to act for it at that time and place, and it must be held responsible for his acts. The company cannot escape by saying he was employed and controlled by the other road. He was, as we have seen, the servant of appellant, to the full extent he acted, in this case.

Again, this company was held to care for the safety of all persons whilst exercising its franchises, whether on its road or the road of another. This was the duty imposed by law when it received its franchises, and the duty inheres whenever and wherever the company exercises them. This is a duty that attaches at all times, and at all places where the company operates its road. It was, then, the duty of appellant, by its servants, to see and know that the track was in a good and safe condition—not only to the passengers, but to those rightfully near to and liable to be injured by its being operated when in an unsafe condition. By slight attention this danger could have been seen and avoided. Appellant, by the contract, for the purpose of running into and out of the depot, made this portion of the track its own, and must be responsible for all injuries resulting from negligence in keeping or permitting it to be in an unsafe condition. Had this part of the road being used by appellant in fact belonged to it, and been operated by its servants, no one, we apprehend, would claim appellant would not be liable. Then, when it acquired the right to so use the road, and its use to be controlled by the road-master, and obstructed by him, or those under him, appellant must be equally liable. By the contract appellant yielded, instead of retaining, the necessary control to secure the safety of other persons. Moreover, the ser-

vants of appellant in charge of the engine were not prohibited from seeing and removing the obstruction, and it was their duty to have seen and remove it.

The law thus rendering appellant liable, it becomes a fruitless question, in this case, to inquire whether the Chicago & Western Indiana Railroad Company was liable. If it was, then appellee had her option to sue either alone, and, it may be, both, as *tort feorsors*. But she was not required, by any rule of which we are aware, to sue either one instead of the other, or to sue both jointly. The court below instructed in accordance with the views we have expressed, and refused to instruct in accordance with the views contended for by counsel for appellant, and the giving and the refusing of the instructions was not erroneous.

On the entire record we perceive no error, and the judgment of the appellate court is affirmed.

Judgment affirmed.

Liability for Torts When One Company Uses Track of Another.—

Where a railroad company by contract uses the track of another company, it is in general liable for all injuries occasioned while using that track, as though it were his own. *Murch v. Concord R. Corp.*, 9 Fost. (N. H.) 124; *Stetler v. Chicago & N. W. R. Co.*, 49 Wis. 609.

Relative Liability of Lessor and Lessee.—Where one railroad is leased and operated by another exclusively, the company lessee is alone responsible for injuries committed in the course of operating the road. *McMillan v. Michigan S. & N. I. R. R. Co.*, 16 Mich. 79, 102; *Sprague v. Smith*, 29 Vt. 421; *McClure v. Manchester & L. R. R. Co.*, 13 Gray, 124; *Festal v. Middlesex R. Co.*, 109 Mass. 398; *Ditchett v. Spuyten Duyvil & P. M. R. Co.*, 67 N. Y., 425; *Pittsburgh, C. & St. L. R. Co. v. Campbell*, 86 Ill. 443; *Wasmer v. Delaware, L. & W. R. Co.*, 80 N. Y. 212; s. c. 1 Am. & Eng. R. R. Cas. 122; *Fontaine v. Southern Pacific R. Co.*, 1 Am. & Eng. R. R. Cas. 159. *Dickson v. Chicago, R. I. & P. R. Co.*, 2 Am. & Eng. R. R. Cas. 538; *Pittsburgh, etc., R. Co. v. Hunt*, 2 Am. & Eng. R. Cas. 649; *Central R. R. Co. v. Brinson*, 8 Am. & Eng. R. R. Cas. 343; *Atchison, T. & S. F. R. Co. v. Cruzen*, 15 Am. & Eng. R. R. Cas. 515.

Statutory Provisions.—Sometimes the relative liability of the lessor and lessee is settled by statute. *Stephens v. Davenport & St. P. R. Co.*, 36 Iowa, 327; *Clary v. Iowa Midland R. Co.*, 37 Iowa, 344; *Gusted v. Newburyport Horse R. Co.*, 127 Mass. 204.

McGRATH, Adm'x,

v.

NEW YORK & NEW ENGLAND RAILROAD CO.

(*Advance Case, Massachusetts, January 26, 1884.*)

A railroad workman after finishing his work was told by his foreman that there were twenty minutes before the next train, which was understood to mean the next regular train. Whereupon the workmen with others mounted a hand-car to go to the next station, was overtaken by a special train and was killed. No carelessness was attributable to the special train,

after the hand-car was discovered on the track; no flags were sent out by the hand-car men, and a rule of the railroad company known to the hand-car men stated that "they may expect a train in either direction without signals being shown for it."

In an action brought to recover damages for the death:

Held that the action could not be maintained as the workmen assumed the risk of riding on the hand-car by voluntarily and without objection mounting it when no flags had been sent out, and also the risk of any omission on the company's part to signal the special train, by mounting the car with full knowledge of the above rule.

DEFENDANT'S petition for a new trial.

This action was trespass on the case charging the defendant with negligence which resulted in the death of the plaintiff's intestate. He was a workman employed by the defendant and was riding with other workmen on a hand-car from Providence to Olneyville, when the car was overtaken by a special train from Providence, and he was killed. The accident happened November 27, 1879, as the workmen were returning home from their work.

Number twenty-four of the company's rules is:

"Section foremen are directed to give close attention to the telegraph wires, unite them when broken, reset poles when down or in danger of falling, and render any required assistance to the telegraph repairer. *They may expect a train in either direction without signals being shown for it*, and will use every precaution to insure safety."

The other facts necessary to make the petition intelligible are stated in the opinion of the court.

The plaintiff recovered a verdict of \$2,900, and the defendant filed this petition.

Chas. E. Gorman, for plaintiff.

Wm. P. Sheffield and *Frank S. Arnold*, for defendant.

PER CURIAM.—We think the verdict is against the evidence and the weight thereof. The evidence shows that the intestate was acquainted with rule twenty-four and consequently knew the risk he was running from special trains by riding on the hand-car. It does not appear that he rode there by any positive command or coercion from his superior. The testimony on that point was this: After the work of the day was done, the foreman said to him and others of his gang that there were twenty minutes before the next train, meaning, as was well understood, the next regular train, and therefore time to reach the station before it came along; thereupon the men mounted the car without objection, the intestate as willingly as the others—all of them, for anything that appears, being ready to take the risk without the delay of sending out red flags, which would have protected them, apparently because they were in a hurry to get home, as it was thanksgiving day. There was no carelessness in the management of the special train

after the hand-car was discovered. The accident may be attributed to two causes, to-wit: neglect on the part of the hand-car to send out the red flags or to take other sufficient precautions, and an omission on the part of the company to signal the coming of the special train. The defendant accepted both risks; the first by riding on the hand-car willingly and without objections, knowing that the flags had not been sent nor other precautions taken; the second, by riding there knowing of rule twenty-four which permitted the despatch of special trains without signaling in advance. By continuing in the service after being informed of the rule he accepted the risk of such unsignaled special trains as one of the risks of the service.

Petition granted.

See *Pennsylvania R. R. Co. v. Wachter*, and note, 15 Am. & Eng. R. R. Cas. 187.

ILLINOIS CENTRAL RAILROAD COMPANY

v.

FRELKA.

(110 *Illinois Reports*, 498.)

Where two railroad companies have by agreement a joint occupancy of depot grounds, in which their respective tracks are so situated and used that the servants of the two companies must necessarily, in the proper discharge of their duties, pass over each other's tracks, each company will owe the same duty to the servants of the other company in the matter of observing proper care for their safety when crossing its tracks in the regular discharge of their duties, that it does to its own servants when crossing the same tracks.

Where the servants of two railroad companies occupying the same depot grounds with their respective tracks, are required in the performance of their duties, to pass over the tracks of both companies, a sign erected upon the grounds warning all persons to keep off the tracks, and informing them if they went upon them it would be at their peril, would not be regarded as applying to the servants of either company.

On an appeal from a judgment of the appellate court affirming the judgment of the trial court in favor of the plaintiff in an action to recover damages for a personal injury, occasioned by the alleged negligence of the defendant, it was assigned for error that the damages were excessive; but it was held, that was a question for the appellate court—not this.

APPEAL from the Appellate Court for the first district—heard in that court on appeal from the Circuit Court of Cook county.

The two instructions, numbered one and nine, asked in behalf of the defendant below, and refused by the trial court, are as follows:

“1. The court instructs the jury that upon all the evidence in this case, and under the law that fixes the rights and prescribes

the duties of the parties thereto, the plaintiff has no right to recover, and it is the duty of the jury to find the defendant not guilty."

"9. If the jury believe from the evidence that there were notices, in the English language, on the grounds or yards of the defendant at its depot in Chicago, at the time and before the accident complained of, warning or notifying persons not to go upon its tracks or grounds in said yards, or in words to that effect, then the court instructs the jury that the plaintiff was bound to observe said notices, and that this is the law, even if the plaintiff could not read the language in which said notices were written or painted."

William Barge, for the appellant.

Brandt & Hoffmann, for appellee.

MULKEY, J.—The present appeal brings before us for review a judgment of the appellate court for the first district, affirming a judgment of the Circuit Court of Cook county, for \$5,000, lately recovered in that court in an action on the case, brought by Michael Frelka, the appellee, against the Illinois Central Railroad Company, the appellant, on account of personal injuries alleged to have been caused by the negligence of the company in operating a switch engine.

The evidence in the case tends to prove that appellee, on the morning of the 18th of January, 1879, at the hour of six o'clock, or perhaps a little before, entered by way of Randolph street, the depot grounds of the appellant and the Michigan Central Railroad Company, lying immediately south of the passenger depot of the two companies, situated on the west side of Lake Michigan, in the city of Chicago, and that while attempting to cross the tracks of the defendant to reach a caboose standing on the tracks of the Michigan Central Company, he was struck, knocked down and dragged for a considerable distance by a switch engine of the appellant, breaking and crushing the ankle and thigh bones of his right leg, and otherwise seriously injuring him, whereby he was permanently disabled, so that he is now unable to get about, except on crutches. The depot grounds where the accident happened, were, at the time it occurred and for many years before that time had been, in the joint occupancy, use and control of the appellant and the Michigan Central Company, though each company had and operated its own tracks; but in doing so, the grounds in question, for the purpose of passing and repassing in the discharge of their duties, were open alike to the servants and employés of both companies. The greater portion of these grounds lie between Randolph street on the north, and Monroe street on the south, if extended eastwardly, the two streets being about 1,250 feet apart. The employés of the two companies living in the city, generally

went by way of one or the other of these streets to the depot grounds, and consequently entered them in either case from the west side, as the city lies altogether west of them. The track upon which the accident happened, as well as several others belonging to appellant, lies west of most of the tracks of the Michigan Central, including the one on which the caboose was standing, and which appellee was trying to reach when struck by the engine—consequently, the employés of the Michigan Central Company, coming from the city, in order to reach the tracks of the latter necessarily had to cross the appellant's tracks. The evidence also tends to show that the Michigan Central Company, at the time of the accident, and for many years previous thereto, had in its employ a considerable force of men who worked at the stock yards, south of the depot grounds, but who lived in the city and that it was the custom for them every morning, a little before six o'clock, to assemble at the depot grounds in question, where they uniformly found a caboose, with an engine attached, standing on some of the Michigan Central tracks, in readiness to convey them to their work at the stock yards. At the time of the injury complained of, appellee was and for some two months before that time had been, in the employ of the Michigan Central Company, and was one of the daily force living in the city that worked at the stock yards, and at the time in question was making his way across the appellant's tracks to the caboose on the Michigan Central tracks, as heretofore stated, for the purpose of being conveyed to his work at the stock yards. By a regulation of the appellant, of many years' standing, its employés were required when moving an engine after night over these grounds, to keep the bell ringing and the head-light burning, and this regulation as a general rule, had heretofore been strictly observed by the employés of the company, though in the present instance it was wholly disregarded, and we are of opinion under the evidence the jury were warranted in concluding, as they probably did, the accident was occasioned by its non-observance. The evidence also tends to show appellee, in crossing appellant's tracks between five and six o'clock in the morning, as he did, had no reason from the usual course of business of the company, to expect any of its trains or engines would be moving at that time, as it appears to have been a matter of rare occurrence for them to be in motion at that hour. Nevertheless, appellee does not appear to have been any the less careful on this ground, for he testifies that just before receiving the injury he cast his eyes up and down the tracks as far as he could, but was unable to see or hear anything to warn him of the approach of the engine, which immediately thereafter struck him down.

The foregoing is a general outline of the facts as claimed by appellee to be established by the evidence. Whether this claim is

well founded is not for us to say. That was a question for the lower courts, which has been decided adversely to the appellant, and we are not permitted to review it. Notwithstanding, much of the argument of counsel in this case is devoted to a discussion of the weight of evidence upon questions of controverted facts, with which we have not the slightest concern, and we must, therefore, decline to follow them in that discussion. As an illustration of this, counsel for appellant at the very threshold of his argument, premises that appellee, at the time of the injury, "was not in the service of the defendant, and never had been; that he was not intending to enter any car or caboose of the defendant; that he was on no business of appellant, and that it held out no inducement for him to go across its tracks; that he was not upon the depot grounds by any license, express or implied, from appellant." Most of these statements may be admitted to be true, and really are true. But counsel, in an argument addressed to this court, is certainly not warranted in making the last statement. Whether the appellee was upon the depot grounds at the time of the accident, by the license or consent of the appellant, was a mixed question of law and fact, which the jury under the circumstances, were bound to pass upon, and must necessarily have found in appellee's favor, and so we must assume in our disposition of the case. When these two companies agreed, as the circumstances clearly show they did, to a joint occupancy of the depot and depot grounds, and located their tracks as we now find them, they were bound to know their business could not be successfully carried on without their respective servants, in the discharge of their duties, having to pass over each other's tracks, and hence it is but reasonable to conclude they impliedly consented this might be done, and the fact that this was done for so many years, without objection, affords the strongest evidence this was the understanding of the parties. But as before stated, these were matters of fact, for the circuit and appellate courts, and not for us.

This vital question having been settled in appellee's favor, there is really nothing left of appellant's case and we fail, therefore, to perceive the pertinency of the long list of authorities cited and commented upon in appellant's brief, to the effect that a mere trespasser or wrong-doer cannot maintain an action for negligence against one who, at the time of the injury complained of, owed the plaintiff no legal duty. We do not at all question the law of the cases cited on that point, but it clearly has no application to the case before us. Under the facts, as the jury must have found, the appellant owed the same duty to the servants of the Michigan Central Company, when crossing the former's tracks in the regular discharge of their duties, that it did to its own servants when crossing the same tracks.

It follows, from what we have already said, the court properly

refused to give appellant's first instruction, which directed the jury to find for the defendant.

It appears, from the evidence, on the extreme west side of the depot grounds two signs were erected, warning all persons to keep off the tracks, and informing them if they went upon them it was at their peril. It does not distinctly appear who put up these signs, but we do not regard this as material, as they could not have been intended to apply to the servants of either of these companies whose duties required them to pass over the tracks. Such being the case, it follows the court properly refused to give the appellant's ninth instruction, which in effect, told the jury appellee was bound by such warning, and had no right to go upon the tracks in question.

Other objections are taken to the rulings of the court on the instructions, but we find no merit in them. Taking the instructions as a whole, we think they fairly laid down the law applicable to the case. If there be any ground for complaint on that score it lies with the appellee and not the appellant.

Finally, it is objected the damages are excessive. That was a question for the appellate court—not this.

The judgment will be affirmed.

Judgment affirmed.

Analogous Cases.—Compare *Tebbutt v. Bristol Exeter R. Co.*, L. R. 6, Q. B. 68; *Kain v. Smith*, 2 Am. & Eng. R. R. Cas. 545.

VEITS

v.

TOLEDO, A. A. & G. T. RY. CO.

(*Advance Case, Michigan, October 15, 1884.*)

The evidence failing to establish negligence on part of defendant railroad company or its employes, and showing that deceased, who was killed while coupling cars, was a youth of ordinary intelligence, and that he was fully aware of the dangerous business in which he was employed, and not entirely inexperienced, the judgment in favor of defendant is affirmed.

ERROR to Monroe.

B. F. Graves, for plaintiff.

Grosvenor & Landon, for defendant.

CHAMPLIN, J.—The defendant is a corporation formed by a consolidation of the Toledo & Ann Arbor Railroad Company with the Toledo, Ann Arbor & Northwestern Railway Company. Herman G. Veits was killed while in the employ of the Toledo

& Ann Arbor Railroad Company as a brakeman, previous to the consolidation. The claim made by the plaintiff, as presented to this court, is as follows: "That the plaintiff's intestate was a boy 18½ years old, without experience in coupling cars, entirely unacquainted with the danger attending such work, large of his age, clumsy, and slow in his perceptive faculties; and that on or about the 7th of December, 1878, the Toledo & Ann Arbor Railway Company, (which has since been consolidated with another railway, making the defendant), through its conductor, John Carland, hired the plaintiff's intestate, and put him on to one of its freight trains going north through Dundee towards Ann Arbor, and sent him to using the brakes and coupling cars on the freight train, the most hazardous work known to railway employes; that they did this without his parents' knowledge, and without instructing him how to perform his duties and to avoid dangers, or in any manner pointing out to him the danger attending the work he was sent to perform, and by reason of this neglect on the part of the company he was killed. It is claimed by the plaintiff that he went upon the train at Carland's request on the morning of the 7th of December, at Dundee crossing, without doing any coupling. The train ran to Azalia, the first station north of Dundee, on defendant's road, where the conductor sent young Veits to make the rear coupling, while himself, the engineer, and the other brakeman proceeded to 'kick' back cars for young Veits to couple, and that, while doing this work, in some inexplicable manner he got between the cars, and was crushed to death. This is the burden of the first count in the declaration, the second count having been abandoned. The third count charges that the plaintiff's intestate was injured, from which death resulted, by the negligence and incompetency of one Harris McDaniels, the engineer in charge of the engine at the time; and that the company was negligent in keeping him in their employ after it knew, or ought to have known, by the exercise of reasonable diligence, that he was careless and incompetent."

At the conclusion of the testimony the court charged the jury that the plaintiff had failed to prove such negligence as warranted them to render a verdict for the plaintiff, and directed a verdict for defendant; and the only question to be considered here is whether this instruction is correct. The bill of exceptions embraces the whole testimony given on the trial. From this testimony it appears that the deceased was between 18 and 19 years of age at the time of his death; that he had worked on the railroad in different capacities, such as wiping engines, spiking and doing work in constructing the road, and had, with his father, worked on a gravel train as shoveler. He had also worked for two or three weeks as a fireman on an engine. The plaintiff, who is the father of the deceased, testified that he never applied for a

position for him upon the road, but that he made no objection to his firing or working on the gravel train; that he was five feet four inches in height, and weighed about 135 or 140 pounds; that he was good to mind, but slow to learn and understand—slow to comprehend complicated matters; that, so far as he knew, he had the use of his arms and legs and body as perfectly and freely as any young man, and that there was no bodily infirmity that he knew of. It appears from the testimony that the deceased had, while employed by the railroad company previous to the hiring as brakeman, performed the duty of braking and coupling cars. The conductor says that he had been on and off with him on the freight train two or three weeks; had rode up and down the road with him, helped to unload freight, coupled cars on the side track or on the main track whenever he wanted to. He wanted a position as brakeman, and was there practicing; one of the brakemen was away and Veits took his place. Veits was hired as a brakeman on the morning of the accident, which occurred at a station called Azalia, while in the performance of his duty as brakeman in coupling cars. No person saw the accident, and the only evidence of the manner in which it happened is the testimony of Carland, the conductor, who states that "Veits said he put the link in the draw-bar and dropped the pin, and reached down to get it, and as he was straightening up caught him between the draw-bars." Carland also testifies that when he was told that Veits was hurt he went around the train where he was, and found him lying on his right side, and his face towards the track to the east, and his feet diagonally across, and said to him: "Herman, are you hurt much?" He said: "Oh, Jack, I am killed!" and he said: "There is no one to blame but myself." The station agent also heard him make the same remark.

There is no evidence in the case tending to prove any carelessness or negligence on the part of the engineer or conductor, which caused the accident. It is in evidence that the car which Veits was attempting to couple at the time he was killed was found to be about four feet from the car of the train to which the coupling was to be made, and that the distance was caused by the rebound of the car after it had struck Veits, and evidence was introduced to show that to cause such rebound the engine must have been moving at the rate of ten to fifteen miles an hour. Plaintiff's own testimony, however, was positive and direct upon the point that the speed of the engine at the time of the accident was about two or three miles an hour, and was the speed used in coupling cars. Having shown this fact, the testimony of experts, based upon the rebound of four feet, is entitled to no weight as tending to prove the speed of the engine to be ten to fifteen miles an hour. It is evident that there must be numerous causes besides the speed of the car which might produce such rebound; such as the grade at

that point, the weight of the impinging cars, and the strength and elasticity of the springs behind the draw-bars, none of which facts were placed before the experts to enable them to form a correct opinion.

We are satisfied from the evidence disclosed in this record, that the deceased was a youth of ordinary intelligence, and that he was fully aware of the dangerous business of coupling cars, and not entirely inexperienced, and that his death was not caused by any negligence or carelessness of defendant's employes in charge of the train.

The record discloses no error, and the judgment is affirmed.

Duty of Company to Minor Servants.—A railroad company employing a minor upon its road is bound to explain to him fully the risks and dangers incident to his employment, if he is not himself acquainted with them. It is bound also not to place such employe in any position of extraordinary peril unsuited to his age and abilities. The company will be held to the performance of these duties to minors much more strictly than as to adults. *Railroad Co. v. Fort*, 17 Wall. 553; *Chicago, etc., R. Co. v. Harney*, 28 Ind. 28; *Hill v. Gust*, 55 Ind. 45; *St. Louis, etc., R. Co. v. Valinus*, 56 Ind. 511; *Memphis, etc., R. Co. v. Jones*, 2 Head. (Tenn.) 517; *Allison v. Western, etc., R. Co.*, 64 N. C. 382; *Lewis v. McAffe*, 32 Ga. 405; *Hamilton v. G. H. & S. A. R. Co.*, 4 Am. & Eng. R. R. Cas. 528.

Whether or not a company has been in fault in failing to give warning to a minor servant of danger in his particular employment is for the jury. *Pennsylvania Co. v. Long*, 15 Am. & Eng. R. R. Cas. 345.

Minor Servant Runs Risks of Employment.—But a minor must be taken to undertake to run all the ordinary risks of his employment, including the negligence of fellow servants. The company is not therefore liable to him for any injury resulting from such cause. *King v. Boston, etc., R. Co.*, 9 Cush. 112; *Nashville, etc., R. Co. v. Elliott*, 1 Coldw. (Tenn.) 611; *Chicago, etc., R. Co. v. Harney*, 28 Ind. 28; *Ohio, etc., R. Co. v. Hammersly*, 28 Ind. 871; *Gartland v. Toledo, etc., R. Co.*, 67 Ill. 498; *McGinnis v. Canada S. Bridge*, 8 Am. & Eng. R. R. Cas. 185.

Liability of Company to Parents of Minor Servants.—See as to the liability of the company to the parents of a minor servant. *Grand Rapids & G. R. Co. v. Showers*, 2 Am. & Eng. R. R. Cas. 9; *Hamilton v. G. H. & S. A. R. Co.*, 4 Am. & Eng. R. R. Cas. 528; *Texas & Pacific R. R. Co. v. Carlton*, 15 Am. & Eng. R. R. Cas. 350, and note containing full list of authorities.

KITTERINGHAM

v.

SIOUX CITY & PACIFIC RAILWAY CO.

(62 Iowa Reports, 285.)

A car repairer was seriously poisoned while engaged in pursuance of his duties in removing old brasses from the boxing of car wheels, by a certain poisonous grease that had formed thereon. In a suit brought by him against the company the negligence averred was the failure upon the part of the defendant to have the brasses removed before the grease formed. In such suit, *held*, that it was not competent to ask a witness as an expert when the work

should be done. The witness should state the results accruing from delay in having the work done, and the jury should determine whether or not the delay shown in the case on trial constituted negligence.

Evidence as to the time when railway companies usually replace certain portions of their machinery is immaterial, when it is not shown that the custom has any relation to the avoidance of the kind of injury complained of.

Where an employé of a railway company knew, or by the exercise of reasonable care could have known, of the company's negligence, whereby he claims to have been injured, and of which he complains, he was guilty of contributory negligence in incurring the danger, and he cannot recover for the injury so sustained.

Where the evidence tended strongly to show that the injury complained of was the result, not of defendant's negligence, but of an ordinary cut, aggravated by a depraved condition of plaintiff's system, the court properly instructed that plaintiff could not recover, if the jury found that plaintiff's injury occurred by reason of the impurity of his blood.

Where nothing has ever occurred to suggest to a railway company that there is any danger in a certain line of conduct, the company cannot be said to have had such means of knowledge of the alleged danger as to render it negligent in continuing in that line.

An instruction which properly states the law, but which plaintiff claims was not applicable to the theory of his case, could work no prejudice to him, and is no ground of reversal on his appeal.

APPEAL from Woodbury District Court.

The plaintiff alleges in his petition, in substance, that he was in the employment of defendant, performing the duties of a helper in its machine shops, and that he was instructed by the defendant's master mechanic to remove the old brasses belonging to the boxing of certain car wheels and axles, which were covered over with poisoned grease, and that plaintiff were dangerously poisoned by the handling of such brasses, necessitating the amputation of the middle finger of his left hand, and resulting in the loss of the use of his left arm and hand. The plaintiff prays judgment in the sum of \$5,000. There was a jury trial, resulting in a verdict and judgment for the defendant. The plaintiff appeals.

Burnham, Hudson & S. H. Cochran, for appellant.

Joy & Wright, for appellee.

DAY, CH. J.—I. The plaintiff introduced as a witness one John McKenzie, who testified that he repairs cars for a living, and had about seven years' experience in greasing cars, but quit it about seven years ago, and that he is not now employed by the company, and has not been for some time, and that he knows about the substance formed on the boxing of car wheels, but does not know of any poisonous substance that is ever formed on the brasses of the boxes of the car wheels. The witness was then asked this question: "When ought they to be removed?" This question was objected to as incompetent and immaterial, and upon the ground that it is not shown that the witness is competent to judge. The objection was sustained, and this action is assigned as error. Ap-

pellant insists that "this question was propounded to show that the brasses should always be removed before they are worn as thin as a knife, before they become broken, or before the old axle grease burns into the broken brass, and thereby causes a poisonous substance, which failure to remove would constitute the elements of negligence." We think, however, that the proposed fact is not competent to be established by the opinion of a witness offered as an expert. The effects of allowing the brasses to become worn thin and broken should be shown. Then the jury would be competent to determine whether it was negligence to fail to remove them before such condition existed. To allow a witness to testify as an expert to such fact, would be to substitute the witness for the jury.

II. This same witness further testified that he knew the custom of railroads in removing these old brasses. He was then asked the following question: "What is the custom in reference to the time when they should be removed—before they get so they break, or afterward?" This question was objected to, and the objection was sustained. The custom of railroads, as to the removal of the brasses before they break is not material. They might remove them before they become so thin as to break, for the purpose of preventing injury to the axles, or accidents to the train. The real question in this case is, do the brasses accumulate a poisonous substance if not removed before they become so thin as to break? The custom of railroads as to the time of removal could throw no light upon this question.

III. The appellant complains of the giving of the third instruction, as follows: "The main questions for you to determine herein, and to which your attention is directed, are as follows: 1. Was the plaintiff to go and remove, and did he go and remove, the brasses from the car wheels at River Sioux, in obedience to a direction of the master mechanic? 2. Were the brasses so removed, at the time of removal, poisonous? 3. If they were poisonous, then did the defendant, through its officers, whose duty it was to keep the cars in repair, have knowledge that the same were poisonous, or would said officers by the exercise of ordinary care have had such knowledge? 4. If the brasses were poisonous, then did plaintiff have knowledge that they were poisonous, or would he by the exercise of reasonable care have had such knowledge? 5. If plaintiff was injured, then did his injury occur by reason of the impurity of plaintiff's blood? If you answer the first, second and third questions in the negative, then there can be no recovery for plaintiff. If you answer the fourth in the affirmative, there can be no recovery. If the fifth is answered in the affirmative, there can be no recovery." Appellant insists that the fourth division of this instruction is erroneous, in that it holds that, if the employé could have, by ordinary care, discovered the

poisonous condition of the brasses, he cannot recover. Appellant also insists that the fourth instruction of the court is erroneous, which in substance directs the jury that plaintiff cannot recover if he knew, or by the exercise of that care with respect thereto which a reasonable man, under the same circumstances, would have exercised, could have known, that the brasses were poisonous. In support of this objection, appellant relies upon *Muldowney v. Illinois Central Railway Co.*, 36 Iowa, 462. The doctrine of this case was limited and explained in *Way v. Illinois Central Railway Co.*, 40 Iowa, 341. See also *Muldowney v. Illinois Central Railway Co.*, 39 *id.* 615; *Money v. The Lower Vein Coal Co.*, 55 *id.* 671. The instructions, in the matter complained of, are not erroneous.

Appellant also complains of the fifth sub-division of the third instruction. The evidence very strongly tended to show that the injury to plaintiff did not result from any poisonous condition of the brasses, and to raise a strong presumption that it arose solely from an ordinary cut, in connection with a depraved condition of the plaintiff's system. The evidence strongly preponderates against the view that any poisonous substance accumulates upon the brasses before they are removed from the axles. No instance of poisoning from the brasses was shown, although the witnesses testified to the receiving of frequent cuts in the removal of the brasses. The injury to plaintiff, which was a small cut upon the finger, was inflicted on Sunday. The finger did not become inflamed until Tuesday. The plaintiff claimed that his finger was poisoned by verdigris on the brasses. The testimony of experts is that, if verdigris is applied to a flesh wound, its action would be immediate, and that if the wound was made upon the finger, and it did not become inflamed for two days, the verdigris had nothing to do with it. The jury were fully authorized to find from the testimony that the injury to plaintiff did not at all result from any poisonous condition of the brasses. The instruction complained of was both pertinent to the evidence and proper. The twelfth instruction of the court is to the same effect as the fifth sub-division of the third instruction, and, for the reasons already assigned, is proper.

IV. Appellant complains of an instruction given at the request of defendant, as follows: "The jury are instructed that the uncontrovertible testimony in the case discloses that defendant and its employes had no knowledge of the existence of any poisonous substance on the said brasses in question, at the time of said injury; and if, from the experience of defendant and its employes, as disclosed by the evidence, they had no cause or reason to believe that there was any poisonous substance on said brasses, there can be no recovery in this action." It is said that this instruction assumes that the railroad company must possess actual

knowledge, when the law only requires means of knowledge, and also assumes that the experience of a railroad company will excuse any negligence that it may be guilty of. The instruction is not vulnerable to the criticism made. As already stated, the evidence strongly preponderates against the view that any poisonous matter accumulates upon the brasses before their removal from the axles. If nothing had ever occurred in the experience of defendant to suggest the existence of such poisonous accumulation, it did not possess such knowledge as would render it negligent in not discovering the existence of poisonous matter on the brasses in question.

V. Appellant assigns as error the giving of the following instructions: "In determining whether the defendant was negligent you must consider the light and knowledge the defendant had at the time of the alleged injury; and if at that time it had no knowledge that there was any poisonous substance on the brasses in question, and by the exercise of ordinary care would not have had such information; and if there had been no injurious substance in the use of such brasses prior to said alleged injury in the operation of defendant's railroad, then the defendant was not negligent." This instruction is clearly correct. Surely, the defendant was not negligent if there had existed no injurious substance in the prior use of the brasses, and defendant did not know, and by the exercise of ordinary care would not have known, that there was any poisonous substance on the brasses in question.

VI. Appellant assigns as error the giving of an instruction to the effect that the plaintiff cannot recover through or by reason of any negligence on the part of a co-employé of plaintiff, if the injury was not occasioned while the plaintiff was engaged in the operation of defendant's road, or in a manner connected with the operations of the road. It is not claimed that the instruction is in itself erroneous, but that it had no application to the case, because the action was not based upon the statute, but upon the theory of the master's liability to the servant. If this be true, the giving of the instruction could have worked no prejudice.

VII. The appellant complains of the giving of the following instruction: "If the jury find from the testimony that defendant used upon its cars the same kind of oil that was generally used upon the cars of railroad companies at the time of said alleged injury, and had no knowledge, and, by the exercise of ordinary care, would not have obtained any knowledge, that there was any poisonous substance on the brasses in question, then the plaintiff cannot recover." There is nothing whatever in the evidence to show that the oil used by defendant was impure or that it might not be properly used. Appellant claims, however, that from this instruction the jury may have presumed that, if the oil used was not of itself poisonous, the company was not responsible. It is

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clear that this construction cannot properly be placed upon the instruction. The defendant's immunity is expressly made to depend upon its want of knowledge, or of the means of knowledge, in the exercise of ordinary care, that there was any poisonous substance upon the brasses. The instructions asked, so far as applicable and proper, are covered by the instructions of the court. The record discloses no error.

Affirmed.

Servant Continuing in Employ of Company Knowing of Defect in Apparatus Does so at his Own Risk.—When a servant of a railroad company becomes aware of the fact that the apparatus which he is using is defective, notwithstanding which he continues the use of it without objection, he will be deemed to have assumed the risk of his employment, and cannot recover in case of injury. *Patterson v. Pittsburgh, etc., R. R. Co.*, 76 Pa. St. 389; *Davis v. Detroit, etc., R. Co.*, 20 Mich. 105; *McMillan v. Saratoga, etc., R. Co.*, 20 Barb. 449; *Toledo, etc., R. Co. v. Eddy*, 72 Ill. 138; *Dillon v. Union Pac. R. Co.*, 3 Dillon, 319; *Chicago, etc., R. Co. v. Munroe*, 35 Ill. 25; *Ladd v. New Bedford R. Co.*, 119 Mass. 412; *Hamathy v. Northern, etc., R. Co.*, 46 Md. 280; *Devitt v. Pacific R. Co.*, 50 Mo. 802; *International R. Co. v. Doyle*, 49 Tex. 190; *Dale v. St. Louis, etc., R. Co.*, 68 Mo. 455; *Georgia R. Co. v. Kenney*, 58 Ga. 485; *Green & Coates Sts. Pass. R. Co. v. Bresmer*, 4 Am. & Eng. R. R. Cas. 647; *Naylor v. Chicago, etc., R. Co.*, 5 Am. & Eng. R. R. Cas. 460; *Houston & T. C. R. Co. v. Myers*, 8 Am. & Eng. R. R. Cas. 114; *Louisville, etc., R. R. Co. v. Orr*, 8 Am. & Eng. R. R. Cas. 94; *Umbach v. Lake Shore & M. S. R. Co.*, 8 Am. & Eng. R. R. Cas. 98; *Sweeney v. Central Pacific R. Co.*, 8 Am. & Eng. R. R. Cas. 151; *Watson v. Houston & T. C. R. Co.*, 11 Am. & Eng. R. R. Cas. 213; *Jackson v. Kansas City, L. & S. K. R. Co.*, 15 Am. & Eng. R. R. Cas. 178; *East Tenn., etc., R. R. Co. v. Smith*, 15 Am. & Eng. R. R. Cas. 224; *Yeaton v. Boston & Lowell R. R. Corp.*, 15 Am. & Eng. R. R. Cas. 253.

Personal Injuries Aggravated by Predisposition to Disease.—The fact that a person has in his system a predisposition to disease which makes a particular injury suffered by him more severe than it otherwise would be, does not exempt the railroad company from full liability for all the direct consequences of the injury. *Heirn v. McCaughan*, 32 Miss. 17; *McAllister v. State*, 17 Ala. 434; *Commonwealth v. Fox*, 7 Gray, 585; *Stewart v. City of Ripon*, 38 Wisc. 584; *Mobile & Ohio R. R. Co. v. Arthur*, 43 Miss. 180; *Jewell v. Railway*, 55 N. H. 84; *Baltimore City Pass. R. Co. v. Kemp*, 61 Md. 74.

But see *contra* *Pullman Palace Car Co. v. Barker*, 4 Col. 344.

The same principle has been applied in the case of injuries to pregnant women. *Brown, et ux. v. Chicago M. & St. P. R. Co.*, 54 Wisc. 342; *Oliver v. La Valle*, 36 Wisc. 592; *Heirn v. McCaughan, et ux.*, 32 Miss. 17; *Barbee v. Reese*, 60 Miss. 906.

O'RORKE

v.

UNION PACIFIC R. CO.

(*Advance Case, Colorado, October 8, 1884.*)

A car repairer in pursuance of his duty went under a car upon a side track in order to repair it. While so engaged he was injured by the moving

of the car caused by another car being switched on to the same track. In an action against the company to recover damages the negligence alleged was the failure to provide plaintiff with red flag which he could use as a danger signal. It appeared that plaintiff had for several weeks been employed by the company on the same work and had made no complaint, and had not demanded a red flag. *Held*, that he must be deemed to have undertaken to run the risks of his employment, and that he was not entitled to recover.

MOTION for a new trial. The opinion states the facts.

Markham, Patterson & Thomas, for the plaintiff.

Teller & Orohood, for the defendant.

BREWER, J.—In No. 1176, Michael O'Rorke v. The Union Pacific Railway Company, a motion was made for a new trial. It was an action for personal damages, and a verdict was found for the plaintiff. The substantial facts are these: This plaintiff was a car repairer, engaged in repairing cars along the line of the defendant's road. On the day of the accident he went to the station at Malta, I believe, and found there three cars standing on a side track with a freight train on the main line. The conductor of the freight train told him that the rear car of the three side-tracked cars needed repairing, and that he should wait there about twenty minutes, which would be time enough to do the work. He went under the car to repair it, and while there parties in charge of the freight train switched a car on to the side track, which started the other cars on the track, and they pushed the car under which he was at work, moving it some few feet, and injuring him. He had no red flag out with which to signal to the engineer, and no assistant to notify parties moving the train that he was at work under the car, and the engineer, moving the train, did not know there was any one under the car. He had no reason to suppose that any one was under it, and switched off his freight car on to the side track without any knowledge, or reason to believe there was any danger in so doing.

Indeed, so far as the action of the engineer is concerned, no negligence can be affirmed in his conduct; the complaint is that the railroad company was negligent in not furnishing to one engaged in that business, and necessarily compelled to go under cars, and liable to be there injured, a red flag, which he might station out as a signal, or furnish him with an assistant to give notice of his position, and that the railroad company was negligent in not so doing. I have no question, whenever they call upon an employé to go into such a position as that, I think it is their duty to provide him with the ordinary means of protection, which, we are informed by the testimony, is a red flag. It cannot be expected that an engineer, in switching cars, can send a man forward to see whether or not some one is under any car, and the red flag, being the ordinary signal of danger, should have been furnished to this man.

But the troublesome question lies back of that. This plaintiff was an old railroad man, fully aware of the dangers of such work as he was then engaged upon; he had been employed on this road, in such work, for seven or eight months, and was in the habit of going under cars under just such circumstances. He had no flag, and he asked for none. Now, the railroad company insists that he waives his right to recover for any injury received in consequence of that fact. This doctrine of waiver, upon which the company relies, is a doctrine which has been developed within the last few years. It has been carried by some courts to a dangerous extent, one which, I think, cannot be finally sustained.

It has been said, and I think there is force in it, that there is really no such thing as a separate and distinct defense of waiver, and that what is called waiver is simply one form of "contributory negligence;" that the difference between waiver and contributory negligence, is the difference between passive and active negligence, and that what is meant by waiver is passive negligence, in omitting to do a thing which the employé ought to have done; and, in this case, it would be said that if the plaintiff omitted to call for a flag—omitted to take precautions which he ought to have taken—and that is nothing more or less than passive negligence.

As I said, this doctrine of waiver has been carried by some courts to a great extent. They have affirmed that an employé, whenever he finds suitable precautions have not been taken for his safety, ought to stop at once, and if he continues on he assumes all the risks. I don't think that can be held to be law.

A case was presented to me in Des Moines, last spring, where that claim was very urgently pressed by the railroad company. In that case, a common laborer, who had been employed for some time as a section hand, was, on this particular day, employed to load railroad iron. It appeared that the railroad company had substituted steel rails for iron rails, and simply thrown the iron rails to one side, and then sent a train along to pick them up. The train was constantly in motion, at first, at a low rate of speed; as two rival gangs, one on each side of the train, worked together, and became more interested in their work, and worked more quickly the train moved more rapidly; finally a flat car, having been loaded too high, and the sides having been insufficiently protected, a rail which was thrown on fell off, and this laborer was caught and hurt, and the company tried to insist upon the doctrine of waiver. That this man had been working all the day, the accident happening about two or three o'clock in the afternoon; that he was willing to do the work, and that he waived his right to compensation in view of that fact; he saw the danger he was in, and, seeing it, continued to work.

I held that the company was liable. I don't think that the urgency can be forced upon an employé so quickly as that for de-

ciding that he cannot be called upon at the instant to stop work if he sees there is danger. Suppose an engineer, running a train between the point of departure and the point of terminus, finds that his engine is out of order, can he stop right here and say he will stop until the injury is mended?

It would not be safe to do this; he must carry the defective engine to its point of destination. No other rule would be safe. And so, generally, a man cannot be called upon, at the moment to say, there is a defect, or there is danger, and I will stop; he has a right to wait a reasonable time; to consider the circumstances of the case, and to give notice to his employers that he is in danger; time enough to see whether the employer means to have the defect remedied; time enough to see the general way in which he conducts his business; and if he finds that his employer intends to use machinery with defects, or to conduct his work in a dangerous manner; finds that is to be his habit, finds that, after he has been notified, he still intends to conduct his business in that way, and then goes on and continues in the work, it is fair to assume that he takes the risks; of course, there can be no question, where it is expressly agreed upon.

Suppose, for instance, that I own a mill; suppose the machinery in it is clearly defective, and I say to an employé, "I am running a mill in which there is defective machinery," and I point out to him the defect, "are you willing to work here and take the risks?" If he says he is, he cannot afterward recover, if he is injured; and so, in order that there should be an implied agreement, the facts should exist for so long a time that the employé has opportunity to see that his employer means to let the machinery remain in that condition, and carry on his business in that way, as a general rule; and if he then continues at work, he may be presumed to consider the compensation sufficient to justify him in taking the risk.

In this respect, it appears that this plaintiff had been for seven or eight months in the employ of the company, along this line of road; that he had done this work day after day without a flag, knowing its necessity, making no complaint, asking for no change, and it seems to me that after we consider this, and all the circumstances of the case, it must be said that negligent although the company was, the man assumed the risks of the danger, knowing what it was, and cannot now hold the company responsible.

I think the motion for a new trial must be sustained.

Servant Failing to Complain of Defective Apparatus Assumes Risks of Same.—When a servant employed by a railroad company plainly perceives the risks which he runs, and nevertheless remains performing the same services without complaint and without suggesting how his employment could be made less hazardous, he will be deemed to have undertaken to run the risks incident thereto. *Davis v. Detroit, etc., R. Co.*, 20 Mich. 105; *McMillan v. Saratoga, etc., R. Co.*, 20 Barb. 449; *Patterson v. Pittsburgh, etc., R. Co.*, 76 Pa. St. 389; *Crutchfield v. Richmond, etc., R. Co.*, 76 N. C. 320; *Illinois*,

etc., R. Co. v. Jewell, 46 Ill. 99; Toledo, etc., R. Co. v. Eddy, 72 Ill. 138; Green & Coates Sts. Pass. Ry. Co. v. Bresmer, 4 Am. & Eng. R. R. Cas. 647; Naylor v. Chicago, etc., R. Co., 5 Am. & Eng. R. R. Cas. 460; Houston & T. C. R. Co. v. Myers, 8 Am. & Eng. R. R. Cas. 114; Louisville, etc., R. Co. v. Orr, 8 Am. & Eng. R. R. Cas. 94; Umbach v. Lake Shore & M. S. R. Co., 8 Am. & Eng. R. R. Cas. 98; Sweeney v. Central Pacific R. Co., 8 Am. & Eng. R. R. Cas. 151; Watson v. Houston & T. C. R. Co., 11 Am. & Eng. R. R. Cas. 218; Jackson v. Kansas City, L. & S. K. R. Co., 15 Am. & Eng. R. R. Cas. 178; East Tennessee, etc., R. R. Co. v. Smith, 15 Am. & Eng. R. R. Cas. 224; Yeaton v. Boston & Lowell R. Corp., 15 Am. & Eng. R. R. Cas. 253.

KANSAS CITY, ST. JOSEPH & COUNCIL BLUFFS RAILROAD COMPANY

v.

FLYNN.

(78 *Missouri Reports*, 195.)

The measure of damages in an action brought by the legal representative of an employé of a railroad company against the company for his death, is not the fixed sum of \$5,000, but a sum not exceeding \$5,000. The right of action is given by Sec. 8 and not Sec. 2 of the Damage Act of Missouri.

A servant, by continuing in the business of his master after he becomes aware of defects in appliances furnished him by his master, does not necessarily assume the risk of all injuries which may result from such defects. If the defects grow out of the want of ordinary care and vigilance on the part of the master in providing or maintaining the appliances, and are not so serious but that with care and prudence on the part of the servant they may be safely used, and at the request of the master he continues to use, and in using them exercises care and prudence, if injury result to him notwithstanding, he may hold the master liable.

The liability of a railroad company for an injury sustained by an engineer through a defect in the track existing through the negligence of the company, will not be discharged upon proof that the air-brake on the engine was out of order, that the engineer knew this, and that if it had been in order the accident might have been averted.

The law, out of regard to the instinct of self-preservation, presumes that a person who has suffered death by a railroad accident, was at the time of the accident in the exercise of due care, and this presumption is not overthrown by the mere fact of the injury.

APPEAL from Buchanan Circuit Court.

W. P. Hall and *Strong & Mosman*, for appellant.

Woodson & Crosby and *Pike & Pike*, for respondent.

PHILIPS, C.—John Flynn was an engineer on defendant's road, running a passenger train to and fro between St. Joseph and Council Bluffs. He was killed by the upsetting of his engine on defendant's road on the 23d day of August, 1875. The plaintiff is his widow and sues for \$5,000 damages. The grounds of negligence alleged in the petition are the bad and defective condition of defendant's railroad track at the point of disaster; the defective condition of the flanges of the wheels of the engine; the defective

and unsafe condition of the air brakes and defendant's failure on notice to repair them, and its neglect and failure to provide the train with sufficient brakemen in the absence of the air brake. The answer tendered the general issue, and pleaded contributory negligence on the engineer's part.

The evidence showed that Flynn was a competent and experienced engineer, and made three trips a week over this road. The engine in question was not the one he used on said road. His regular engine was out of repair. He examined the engine assigned him and deemed it in order. On the 22d day of August he ran in from St. Joseph to Council Bluffs. On the way the air brakes got out of order. He notified the conductor and required the brakeman to employ the brakes the balance of the way. On reaching Council Bluffs he informed the assistant master mechanic of the trouble, but it seems the defect in the air brake could not be repaired there, nor could the repair be made short of St. Joseph. Flynn's assigned duty required him to take this engine and train back to St. Joseph on the 23d. He informed the conductor of the situation of the air brake and requested that the train be broke by the men. The evidence shows that for such train two brakemen were ordinarily sufficient, and that it was customary for the baggageman to perform the duty of brakeman when necessary. On this train there was but one regular brakeman, and the baggageman did not appear to have performed this duty on this trip. On the way back to St. Joseph, while the train was running at "a usual rate of speed, about twenty miles an hour," the wheels of the engine jumped the rails and after running about 500 or 600 feet, went off, killing Flynn. The evidence tended to show that at this point the track was in bad condition, and that the engine was derailed in consequence of a low joint and that this low joint had existed for several days, and was perhaps known to some of the trackmen. There was no evidence that deceased was apprised of its existence, but there was evidence from which it might reasonably be inferred that he had notice of the generally bad condition of portions of the road. The evidence showed that with the air brake, the train might have been checked up before the engine upset, and with the ordinary brakemen it would require probably 400 or 500 feet to check it at the rate it was going. The evidence also showed that J. F. Barnard, general superintendent of defendant, issued on the 22d day of July, 1876, an order to W. D. Rowley, master mechanic of defendant, as follows: "Notify engineers not to run faster than card time between Wing Lake and Corning, and between Phelps and Nishnabotna, and to modify their speed as much as necessary for safety until the track can be got into better condition." This notice was served upon Flynn a short time before the accident, and Flynn endorsed his name on it as evidence of service. The evidence also showed that the point

where the engine and train left the track, and where Flynn was killed, was within the limits described in the notice.

For the plaintiff the court gave the following instructions :

1. If the jury find from the evidence that the road-bed or track of defendant, at the point where the engine in charge of said John Flynn was thrown off the track, was defective or unsafe, or that the said engine at the time of the accident was defective or unsafe, and that defendant knew thereof, or might have known thereof by the exercise of reasonable care and diligence, and that the said engine so in charge of the said Flynn as engineer was so thrown off the said track in consequence of said defective condition of said track or of the said engine after such defective condition of said track or said engine was known or ought to have been known by defendant, and that said Flynn received injuries in consequence of said engine being thrown off the track as the result of said defective condition of said railroad track or engine, of which said Flynn died, and that said Flynn was exercising ordinary care and prudence at the time he received said injuries, and was guilty of no negligence directly contributing thereto, and if they further find from the evidence that plaintiff was the wife of said Flynn at the time of his death, then the jury will find for the plaintiff in the sum of \$5,000.

2. Although the jury may find from the evidence that the track of defendant, at the point where the engine was thrown off, was unsafe or dangerous, or that the engine was defective or unsafe, or that the same was known to the deceased ; yet if the defective or dangerous condition of the said track or engine was not of sufficient character that they could not be reasonably used by the exercise of skill and diligence, then the said Flynn, in using said track or engine as such employé of defendant, did not assume the use of said track or engine at his peril, and was only required to take and was responsible for the care incident to the situation in which he was placed in the use of said track or engine, and whether he exercised such care in the use of said track or engine at the time of the accident, is a fact for the determination of the jury.

The court then gave for defendant the following instructions :

3. If the jury believe from the evidence that the death of John Flynn was caused by the negligence or want of care on the part of the brakemen on the train in proof, the jury will find for defendant.

4. If the jury believe from the evidence that the notice in proof purporting to be signed by J. F. Barnard, as superintendent of defendant, was so signed, and that said Barnard was superintendent as aforesaid at the time of signing the same, and that deceased knew of said notice before the accident in proof, and said notice was in force at the time of the accident, and said accident occurred

between Nishabotna and Phelps by reason of a defect in defendant's track between said points, and by reason of his failure to modify the speed of the train, then the jury will find for defendant.

7. If the jury believe from the evidence that after said air-brake ceased to work, deceased informed the conductor of the train in proof at Council Bluffs that said brake would not work, and that said conductor must tell the brakemen of the train and the baggage master that they would have to brake the train by hand to St. Joseph, and did not ask for additional brakemen, and that said conductor did accordingly direct said brakeman and baggage master to brake said train to St. Joseph by hand, then defendant is not responsible for not employing additional brakemen, and if said accident was occasioned by the want of additional brakemen, they will find for defendant.

9. If the jury believe from the evidence that the negligence or carelessness of deceased directly contributed, either in part or in whole, to his death, they will find for defendant.

10. If the jury believe from the evidence that at the time of the accident the engine or train of defendant was in such condition that with reasonable care it could be used with safety, then for any injury caused by any defect in such engine defendant is not liable, and as to such injury they will find for defendant.

11. If the jury believe from the evidence that at the time of the accident the engine or train of defendant were in such condition that they could not with reasonable care be used with safety, and such unsafe condition was known to deceased, they must find for defendant as to any injury caused by the unsafe condition of such engine or train.

12. If the jury believe from the evidence that the track of defendant at the time and place of the accident was not in such condition as to be used with safety with reasonable care, and that deceased had notice of such condition, then plaintiff cannot recover for any injuries caused by such defect in the road.

13. If the jury believe from the evidence that the road of defendant at the time and place of the accident was in such condition that with reasonable care it could have been passed over by the train with safety, they will find for defendant for any injury caused by a defect in such road.

The court on its own motion gave the following instruction :

If the jury believe from the evidence that the air-brake in proof ceased to work after the train in proof left St. Joseph, and that it was in the same condition when said train left Council Bluffs, and the condition of said air-brake rendered the running of said engine and train dangerous to the safety of said Flynn, of which fact of the defective condition of said brake and the danger to him

from running said train without the use of said air-brake, said Flynn was well acquainted, then said Flynn in starting on such trip, knowing said air-brake to be in said condition, took upon himself the risk of all accidents which might occur by reason of said defective air-brake.

To the giving of said last mentioned instruction the defendant objected and excepted.

The defendant asked a number of other instructions, some of which are immaterial to be passed on, and such as are material will be considered in the proper connection.

This cause must be reversed. The circuit court erred in instructing the jury, if they found for plaintiff, to assess the damages at \$5,000. This being an action by the legal representative of an employé of the railroad company, it accrued under Sec. 3 of the Damage Act, and not Sec. 2. In such case the measure of damages is "not exceeding \$5,000." It may be less. Wag. Stat., Sec. 4, p. 53; *Holmes v. Hannibal & St. Joseph R. R. Co.*, 69 Mo. 585.

As the case must be remanded for re-trial, it is necessary to determine, for the guidance of the trial court, some questions raised on other instructions given and refused on the first trial.

The defendant complains most of the second instruction given for plaintiff, which declared that although Flynn knew of the alleged defect, "yet if the defective or dangerous condition of said track or engine was not of sufficient character that they could not be reasonably used by the exercise of skill and diligence he did not assume the use of said track or engine at his peril, and was only required to take and was responsible for the care incident to the situation in which he was placed in the use of such track or engine, and whether he exercised such care in the use of said track or engine at the time of the accident, is a fact for the determination of the jury." Defendant's counsel insists, for the rule is applicable to every state of facts, that the employé takes upon himself the risks incident to the character of his employment, and that when he has notice of the existence of defective machinery, or implements or appliances connected with his employment, he cannot recover for injuries resulting therefrom.

The general doctrine between master and servant is now pretty well settled. A person entering the service of another takes upon himself, in consideration of the promised compensation, the natural ordinary risks of his employment, the perils incident to the performance of his work, including the negligence of his fellow servants. And the master on his part is bound to use ordinary care and vigilance in providing suitable structure, engines, road-tracks and proper servants. *Ford v. Fitchburg R. R. Co.*, 110 Mass. 240, 255; *Snow v. Housatonic R. R. Co.*, 8 Allen, 441; *Flike v. Boston, etc., R. R. Co.*, 53 N. Y. 549; s. c. 13 Am.

Rep. 545; *Smith v. St. Louis, Kansas City & Northern R'y Co.*, 69 Mo. 32. The master does not become the absolute insurer of the safety of his servant; nor is he bound under all circumstances to provide for him the most approved or best improved machinery and equipments, or such as are absolutely safe. His care in this respect is ordinary precaution. What is ordinary care cannot be determined abstractly. It is necessarily a relative term. It must be measured by the nature of the work to be done, the instruments to be used, the hazard and peril of the situation. The law by "ordinary care" means simply the caution and vigilance which reasonable and prudent men exercise under like circumstance. *Cayzer v. Taylor*, 10 Gray, 274, 280; 2 Thompson on Neg., 982, 983; *Ford v. Fitchburg R. R. Co.*, 10 Mass. 256.

While the servant, by the terms of his undertaking, assumes the risks and dangers of his employment, it must be observed that these are the usual and ordinary risks incident to the particular work in which he is engaged. It does not embrace in every instance casualties and injuries resulting from neglect of the corresponding duty of the master. "This requires him (the master) to use due care in supplying and maintaining suitable instrumentalities for the performance of the work or duty which he requires of the servant, and renders him liable for damages occasioned by a neglect or omission to fulfill his obligation, whether it arises from his own want of care, or that of his agents to which he intrusts the duty." *Snow v. Housatonic R. R. Co.*, 8 Allen, 447. This doctrine springs from the fact that the negligence or malfeasance of the master enhances the risk to which the servant was exposed beyond that which was natural to the risk he assumed. *Wedgwood v. C. & N. Ry. Co.*, 41 Wis. 478. This duty of the master is not discharged by simply providing or having made at the outset suitable and reasonably safe machinery and instruments, but he must maintain them by keeping them in repair or exercising reasonable care and watchfulness to guard against their being out of order and unsafe. *Ford v. Fitchburg R. R. Co.*, *supra*; *Wedgwood v. C. & N. Ry. Co.*, *supra*.

It is equally well settled as a general rule that where the servant, having notice of the existence of defective machinery or bad road-bed or track or of incompetent and reckless fellow servants, voluntarily enters upon duty with such instruments and co-laborers, he assumes the risk and cannot recover for any injury resulting therefrom. But this rule, if it would be inaccurate to say has its exceptions, yet its application is more or less controlled and varied by the special facts and circumstances of the case. In other words, the law is and ought to be a rational science, furnishing a system of practical rules, working always in harmony but possessing such flexibility as to secure in each particular case as exact justice as is possible. So, if a servant takes employment on a rail-

road, knowing that his fellow servants are unskillful and careless, he could not, in case of injury resulting therefrom, insist on a right of recovery based on the rule of the duty of the company to select prudent and discreet servants. So, if he knows that an engine is out of order, or there is a particular defect in a given part of the road-bed or track, yet without more he accepts service on such engine and road, and is thereby injured, he cannot in an action for damages invoke the rule that imposes on the company the obligation to furnish a reasonably safe engine or track. Nevertheless, there are circumstances under which a person, being in the employ of a railroad, having notice of defects in equipments and machinery, may recover for an injury resulting therefrom, as where, on discovering the defect, he is assured by the superior that it is not dangerous or that it will be timely repaired, whereupon in reliance thereon he remains, being himself careful and vigilant, he may recover for the injury resulting from such unrepaired defect. *Holmes v. Clarke*, 6 Hurl. & N. 349; *Clarke v. Holmes*, 7 Hurl. & N. 937; *Patterson v. Pittsburg & C. R. R. Co.*, 76 Pa. St. 393; *Ladd v. New Bedford R. R. Co.*, 19 Mass. 412; *Stoddard v. St. Louis, Kansas City & Northern Ry. Co.*, 65 Mo. 520; *Keegan v. Kavanaugh*, 62 Mo. 232.

Again, take the case now under review. It appears from the evidence that the engine furnished deceased to make the trip with had not been used theretofore by him. It was the duty of the company to furnish him one reasonably safe and in good working order. He looked over it before starting out, and it was apparently efficient. On the way the air-brake proved defective and useless. Suppose the engineer did not consider his train so easily managed without it, would the law or court, or common sense justify him, *en route*, in abandoning his assigned post of duty and leaving his engine and the train of passengers on the track, at the peril of losing his position, when, with the assistance of brakemen and ordinary care he had reason to believe he could safely go through? He would be esteemed by all railroad men as recreant to his high trust and wanting in that staid judgment and nerve which is the basis of a character suited to the responsible office of an engineer.

On his arrival at Council Bluffs it appears he did, in compliance with the regulations of the company, report the trouble to the assistant master mechanic. It then became the duty of the company to repair the air-brake or provide another engine. But this could not be done there, or at least was not done. The only office performed by the air-brake is to stop the train more easily and suddenly than by the old method of brakemen. It in nowise affected the working or security of the engine. In case of derailment it might enhance the chances of safety by enabling the engineer to arrest more immediately the train than with brakemen.

Could it be said, under such circumstances, that the engineer, by continuing at his post, took all the risk of returning with his train to St. Joseph? There was no imminent danger, nor could it be said any danger was obvious. He had the day before come over the track on time with safety, with the air-brake disabled. To have declined to serve his employer under such circumstances would have been inexcusable and justly merited dismissal.

The observation of Napton, J., in *Keegan v. Kavanagh*, 62 Mo. 232, is quite appropriate: "The primary duty of the servant is obedience, and it is not to be expected that he will, upon mere imaginary danger, of which he may be conscious, assert his right to relinquish his employment. He naturally looks to his employer for the observance of all reasonable and proper precautions, and his continuance in the service, when such precautions have not been observed, is rather to be attributed to confidence reposed in those to whose superior judgment he yields. If the risk is such as to be perfectly obvious to the sense of any man whether servant or master, then the servant assumes the risk. But if it is a case where no such obvious risks are incurred, and where it was fair to presume that the employer had been guilty of no negligence, the rule in law as well as common sense and justice is, that the master is responsible for damages, if any ensue." In *Patterson v. Pittsburg & C. R. R. Co.*, *supra*, this same doctrine is announced. Referring to *Clarke v. Holmes*, 7 Hurl. & N. 937, and *Snow v. Railroad Co.*, 8 Allen, 441, the court says: "In both these cases the defects from which the accidents arose were known to the employes, but as they were injured in the discharge of duties imposed upon them by their employers, such knowledge was adjudged not to raise a presumption of concurrent negligence. This doctrine is obviously just and proper. The servant does not stand on same footing with the master. His primary duty is obedience, and if when in the discharge of that duty he is damaged through the neglect of his master, it is but meet that he should be recompensed. The general principle as recognized by our own cases, *inter alia*, *Caldwell v. Brown*, 3 P. F. Smith, 453, and *Frazier v. Pennsylvania R. R. Co.*, 2 Wright, 104, is, that the employer is bound to furnish and maintain suitable instrumentalities for the work or duty which he requires of his employes, and failing in this he is liable for any damages flowing from such neglect of duty." This language is employed with approbation by this court in *Conroy v. Vulcan Iron Works*, 62 Mo. 35.

Speaking for myself, I do not approve of the language "threaten immediate injury, or where it is reasonably probable it may be safely used by extraordinary caution or skill." This language involves a new rule liable to great misconstruction. It makes the liability of the master dependant on the certainty or uncertainty of injury. Under it, as to those injuries certainly to fol-

low, the servant assumes the risk, and as to those which are uncertain the servant assumes none, the master all, of the responsibility. The term "immediate injury" implies that in such case the servant takes the risk, but when the danger is such that injury cannot or may not occur till some far-distant time, the servant assumes no risk at all. The opinion of the judges in *Clarke v. Holmes, supra*, expresses more correctly the true idea: "There is a sound distinction between the case of a servant who knowingly enters into a contract to work on defective machinery and that of one who on a temporary defect arising is induced by the master, after the defect has been brought to the knowledge of the latter, to continue to perform his service under a promise that the defect shall be remedied. In the latter case the servant by no means waives his right to hold the master responsible for any injury which may arise to him from the omission of the master to fulfill his obligation. No doubt a defect thus arising in machinery may be such that no man of ordinary prudence would run the hazard of working on it. If a jury should find that a party complaining had materially contributed to the injury by his own rashness, the action could not be maintained, inasmuch as it is well established that a plaintiff, who has materially contributed to his own injury by his own negligence, cannot recover although he may show negligence in the opposite party. But the question whether the injury of which the plaintiff complains is to be ascribed wholly to the negligence of the defendant, or whether the plaintiff has had any share in bringing it about, is one wholly for the jury." Crompton, J., page 946, says: "We need not consider the personal knowledge, in such a case, the plaintiff had of the danger, because there was a neglect of duty on the part of the defendant in not keeping the machinery fenced. The party cannot recover if he has contributed to the accident, * * knowledge is only a part of negligence."

Applying the law thus ascertained to the facts of this case so far as the air-brake is concerned, it must be borne in mind that it could have had no possible agency in derailing the engine, in the first place. Its disability could only have prevented the earlier arresting of the motion of the engine and possibly prevented its upsetting. Whether it would or not, was a question for the jury. Flynn's knowledge of its condition would not prevent his recovery, provided he ran the engine under circumstances of prudence and care free from negligence on his part contributing directly to the injury. On the other hand, if the company had exercised due care and inspection in furnishing a reasonably safe engine, and the same suddenly, while *en route*, became disabled and after notice it failed and neglected to repair the defect, when in its power to do so, it would, under circumstances of due care on the part of the engineer, have been answerable for the injury, if any,

resulting therefrom. Or if, after such notice, it was unable to make the needed repair at Council Bluffs, or to furnish another engine, but started the engineer back with the defective one, it was its duty to have provided the usually necessary brakemen to run the train over the road to render it safe so far as such a mode of breaking was safe, and if it failed of its duty in this respect, and injury resulted therefrom to the engineer exercising due care, the company was liable. Of these facts, under proper instructions, the jury are the judges.

As to the condition of the track of the railroad, it was the duty of the defendant to have maintained it in a reasonably safe condition for its employés. The engineer had nothing to do with its inspection and repair. That belonged to other employés of the defendant, between whom and the engineer the relation of fellow-servants did not exist, so as to exempt the defendant from liability to the engineer for any neglect of duty of the trackmen. On this all the recognized authorities agreed. The defendant is chargeable for neglect to repair its track when it has notice of the defect or might with the exercise of due care and inspection have discovered the existence of the defect. Notice of this fact to the employés of the company entrusted with the inspection and repair would be notice to the company. Whether the defect alleged in the petition existed, and whether it caused the injury in question, and whether defendant had notice thereof, or might have known of it in the exercise of proper diligence, are questions of fact for the determination of the jury.

The defendant insists that the order issued by the general superintendent was equivalent to notice to the engineer that the road was unsafe, and, therefore, if he continued to run over it he assumed the risk. The order was a command to the engineers, "not to run faster than card time between Wing Lake and Corning and between Phelps and Nishnabotna, and to modify the speed as much as necessary for safety until the track can be got into better condition." There is nothing in the proof to indicate that the engineer was running faster than card time, or that the speed was necessarily hazardous. As these were matters entrusted to the engineer, it was a question of fact for the jury to determine whether he was running in violation of the regulation. If he was and the injury was attributable to his disobedience, he cannot recover. This order did in effect convey information that in the opinion of the superintendent the track was not in good condition. But it is evident that its condition was not such as, in his opinion, to render it unsafe to run a train over it within "card time" and modification of the speed according to the circumstances. It also conveyed the assurance that the track was to "be got into better condition." The evidence showed that this work of reparation was in progress at the time of the accident. Conceding that th

engineer had notice of the general bad condition of the road, this notice from the superintendent, his superior officer, was in effect a declaration that the road was not necessarily hazardous. and the engineer could continue to run over it, exercising care, and that the superintendent would remedy the defect. The engineer has a right to rely on the supposed superior judgment of the superintendent and to continue to run under the assurance of remedying the defect. Authorities cited, *supra*.

In addition to this, the engineer had been running over this road nearly every day—had passed over it the day before. It cannot be said he was guilty of contributory negligence in running over it when hurt. *Ford v. Fitchburg R. R. Co.*, 110 Mass., *supra*; *Lewis v. St. Louis & I. M. R. R. Co.*, 59 Mo. 495; *Snow v. Housatonic R. R. Co.*, 8 Allen 450 In *Patterson v. P. & C. R. R. Co.*, *supra*, 394, the court says: "Let it be conceded that the switch in question was dangerous, yet doubtless many trains had passed over it safely, and hence a man of common prudence might well conclude that though it was more than ordinarily dangerous, yet many more trains might in like manner be passed over it in safety. Under such a state of facts the conductor might properly rest upon the judgment of his superiors who requested him to continue its use hoping by extra care and skill he might avert accidents until the switch was reconstructed or properly repaired."

Hawley v. N. C. Ry. Co., 82 N. Y. 370; s. c. 2 Am. & Eng. R. R. Cas. 247, is most pertinent. The engineer knew that the road was somewhat out of repairs, yet it did not appear that he knew of the particular defect, or that the danger was very great. He was running, under orders, an engine ahead of a passenger train, and was injured by his engine overturning, caused by the bad condition of the road. The court says: "While the plaintiff knew that the road was somewhat out of repair, and that he incurred some danger in running his engine, it does not appear conclusively that he knew how badly it was out of repair, or that the danger was imminent or very great. Three or four passenger trains, beside freight trains, passed over the road daily, each way, and it does not appear that any other accident had happened from the bad condition of the road. The plaintiff and other engineers had frequently run their engines over the road in the same way in which the plaintiff ran his on the occasion of the accident, and had done so with safety. The plaintiff was ordered by competent authority to run his engine just as he did and he had received assurance that the road would soon be put in repair. We must take into account plaintiff's position. His business was that of an engineer, and unless he obeyed orders and ran his engine he would have been obliged to abandon defendant's service. Of one thus situated the law should not be too exacting. We must assume

that the officers of the defendant who had charge of the road and must have known its condition, deemed it safe, and the plaintiff had the right to rely somewhat upon their judgment. Other employes of the road and hundreds of passengers were daily trusting their lives upon the road, and on the day of the accident he was ordered and did precede a passenger train. Under such circumstances, was the plaintiff bound to set up his judgment against that of all others and determine for himself that the road was absolutely unsafe for the passage of his engine, and abandon his position as engineer, or take upon himself the risk caused by defendant's negligence? We think, under all the circumstances, and upon all the evidence given on both sides, that it was a question for the jury to determine whether the plaintiff acted with reasonable prudence and discretion in venturing to run his engine over the road." See also *Dorsey v. P. & C. Construction Co.*, 42 Wis. 583, and *Cummins v. Collins*, 61 Mo. 524.

Instruction number two, given on behalf of plaintiff, while not subject to the unqualified objections made by the learned counsel, was an abstract proposition, too comprehensive, and as a rule of law it could not be of universal application. The instruction ought to predicate as a basis for its application the necessary facts to be found by the jury, and if the jury find them to exist, then they may be instructed that Flynn's knowledge that the air-brake was disabled and that the track was not in good condition, would not prevent plaintiff's recovery under the existence of such facts, provided Flynn was not, at the time and place of the injury, running his train in violation of the directions of the superintendent, and was otherwise exercising due care; of all which the jury are to determine from all the facts and circumstances in evidence.

In view of the law arising on the facts of this case, the second, fifth, sixth and eighth instructions, asked by defendant, were properly refused, especially in view of other instructions conceded to the defendant.

The eighth instruction refused was calculated to confound. It submitted a question almost impossible of solution. If the bad condition of the track, the low joint, caused the derailment of the engine, that was the *causa causans* of the injury, and if it existed through the fault of defendant, the possibility that the engine might have been checked before it overturned had the air-brake worked, would not have discharged the defendant from liability. It is not the case of two or more concurring and independent causes, producing an injury, where the plaintiff himself is the author of one of the causes.

The fourth instruction given for defendant ought not to be conceded again unless the proof is different, tending at least to show that Flynn, having knowledge of the defect at the point of the accident, failed to "modify the speed of the train." The law, out

of regard to the instinct of self-preservation, presumes that the deceased at the time was in the exercise of due care, "and this presumption is not overthrown by the mere fact of injury." The burden rests upon the defendant to rebut this presumption. *Buesching v. St. Louis Gaslight Co.*, 73 Mo. 229, 233.

The judgment of the circuit court is reversed and the cause remanded for re-trial in conformity with this opinion.

Martin, C., concurs; Winslow, C., absent.

For the reasons given in the foregoing opinion, judges Hough, Norton, Ray, and Sherwood were of opinion that the judgment of the circuit court should be reversed and the cause remanded. Judge Henry concurred in the conclusion reached.

Limitation of Damages Recoverable for Causing Death.—The right to recover damages for injuries causing death is altogether statutory and in many States the statutes impose a limitation upon the same which is recoverable. In the following States the amount which can be recovered is limited to the sums named: Colorado, \$3,000 to \$5,000; Connecticut, \$500 to \$5,000; Illinois, \$5,000; Indiana, \$5,000; Kansas, \$10,000; Maine, \$500 to \$5,000; Massachusetts, \$500 to \$5,000; Minnesota, \$5,000; Missouri, \$5,000; Nebraska, \$5,000; New Hampshire, \$5,000; New York, \$5,000; Ohio, \$10,000; Oregon, \$5,000; Utah, \$10,000; West Virginia, \$5,000; Wisconsin, \$5,000.

See *Penna. R. R. Co. v. Boyer*, 2 Am. & Eng. R. R. Cas. 172.

Servant using Defective Apparatus under Promise of Officers of Company soon to Repair same.—When a servant becoming aware of a defect in the machinery which he is called upon to use complains to the proper officers of the company and is requested by said officer to continue to use it, the request being coupled with a promise that the defect will shortly be remedied, it is not necessarily the case that the servant is guilty of contributory negligence in continuing the use of the machinery. The question is for the jury. *Conroy v. Vulcan Iron Works*, 62 Mo. 85; *Laning v. New York, etc., R. Co.*, 49 N. Y. 521; *Crutchfield v. Richmond, etc., R. Co.*, 78 N. C. 300; *Kroy v. Chicago, etc., R. Co.*, 32 Iowa, 857; *Greenleaf v. Dubuque, etc., R. Co.*, 33 Iowa, 52; *Muldowney v. Illinois, etc., R. Co.*, 39 Iowa, 615; *Way v. Illinois, etc., R. Co.*, 40 Iowa, 341; *Belair v. Chicago, etc., R. Co.*, 43 Iowa, 662; *Shawny v. Androscoggin Mills*, 66 Me. 420; *Little Rock & Ft. Smith R. Co. v. Duffey*, 4 Am. & Eng. R. R. Cas. 687; *Greene v. Minneapolis & St. L. R. Co.*, 15 Am. & Eng. R. R. Cas. 214.

EAST TENNESSEE, VA. & GA. R. R. Co.

v.

DUFFIELD.

(12 *Lea's Reports (Tenn.)*, 68.)

A section hand upon a railroad was employed in laying rails which had been taken up and which were being relaid as fast as possible for the next train. The hammer which he was using to drive spikes was defective, having been broken a short time before. He objected to using it on the occasion in question on the ground that it was dangerous to work with. He was or-

dered, however, by the section boss to take it and go to work, otherwise he would lose his place. He did so and in consequence of the defect was injured while at work. *Held*, that the railroad company was liable in damages and that the conduct of the section hand in using the hammer had not been such as to preclude him from recovering for the injury.

APPEAL from the Circuit Court of McMinn county.

W. M. Baxter and John Allison, for railroad company.

S. J. Kirkpatrick and Webb & McClung, for Duffield.

COOPER, J.—Duffield was a section hand in the employment of the railroad company, and was at work in spiking down rails on the road, under a section boss, when the injury was sustained for which he brought this suit. The rails had been taken up and were being relaid as fast as possible for the next train. The plaintiff below was using a hammer with which he had been working for six months. The hammer was furnished by the company and was an old hammer, the plaintiff says, when he got it, and with a handle that he himself had put in it, which was cracked. The face of the hammer at one end was bursted partially off, and the face of the other end was rounded like an egg. The plaintiff says the hammer was broken on the day before the accident in cleaving rails, but there is other testimony tending to show that the hammer had been in the same condition for a week or longer. The section boss directed the plaintiff to take the hammer and drive the spikes in the rails. The plaintiff objected that the hammer was dangerous to work with, but the section boss told him with an oath, to take it and go on with the work, otherwise he would lose his place. The plaintiff did accordingly proceed to drive spikes with the hammer when one of the spikes “flew” under a blow of the hammer and struck him on the shin, breaking the bone and creating a severe and ulcerous wound. According to the testimony the work of driving spikes is a dangerous one, the spikes frequently flying when struck by the most skilful men with the best hammer. The plaintiff testifies that he knew the condition of the hammer and the handle. He says: “Of course I was obliged to see that the hammer was broken; any man who wasn’t blind could have seen the condition of the hammer. I knew when I saw it that it wouldn’t do to drive spikes with and that is why I spoke to the section boss about it.” He had been a railroad hand for thirteen years.

The verdict and judgment were in favor of the plaintiff below, and the railroad company appealed in error. The grounds relied on for reversal are alleged errors in the charge of the court, or in the refusal to charge as requested. The referees have reported in favor of reversal because of an error in the charge.

The court, among other things, charged: “If the evidence shall show you that the defendant furnished to plaintiff a defective

or unsuitable hammer, and that the defects in the hammer were such that plaintiff could have seen them and knows them, and judged of the unsuitableness of the same as well as his superior; and if he, plaintiff, accepted service using the same, or continued in service using the same, with full knowledge of such defects, he would be regarded as voluntarily taking the risk, and he could not recover for any injury resulting from such defective implement. But if the evidence shall show that the plaintiff had already entered upon his employment under the defendant's servant and if, while so engaged, he discovered the defective condition of an implement with which he was ordered or required by his superior to work; and if the evidence shall further show you that he complained to his superior of such defective implement; and if the evidence shall also show you that he was ordered by his immediate superior to use the same on pain of being discharged; then, if the proof shall show that he did so use such defective implement, and while using the same was injured while in the exercise of ordinary care, then the defendant would be liable, and for such damages as all the facts and circumstances may warrant."

The referees suggest that the charge is self-contradictory, the latter end having forgotten the beginning. For while the first paragraph says broadly that the plaintiff cannot recover if he used the hammer with knowledge of its defects, the last paragraph says he may recover notwithstanding such knowledge. The charge is loosely worded, but his honor no doubt intended to say that while, as a general proposition, a servant cannot recover for an injury occasioned by the use of a defective tool while he continues to use it with knowledge of its defects, yet he may recover in the particular case where he was ordered by his immediate superior to use the implement on pain of being discharged notwithstanding his knowledge of its defects. And the question is whether the proposition enunciated is correct as matter of law in view of the facts of this case.

The master is not an insurer of the safety of his servants in respect to the machinery or implements used, nor is he under an obligation under all circumstances, to make use of the safest known instruments, nor is he responsible for a failure to discard an implement which is not such, and supply its place with something safer. His general duty is to supply proper tools. But if the servant knows before he enters service, or discovers afterwards that an instrument is unsafe or unfit in any particular, and notwithstanding such knowledge, voluntarily enters into or continues the employment without objection or complaint, he is deemed to assume the risk of the danger thus known, and to waive any claim for damages against the master in case it shall result in injury to him. *East Tennessee, Virginia & Georgia Railroad Co. v. Hodges*, 2 Leg. Rep. 6. The fact that a servant has complained of a de-

fect will not entitle him to recover unless a promise to repair has been made. And if he continues to serve after the expiration of a reasonable time from the date of a promise to repair, he will be deemed to have accepted the risk of the dangers, and the master will not be liable. On the other hand, there is a class of cases which hold that, although the servant may be aware of the defect, yet if it was of such a nature that a man of ordinary prudence would not, on account of it, have abandoned the service, and the servant continues therein, and was in consequence of the defect injured, he may recover damages. 2 Thomp. Neg. 1010. The rule, if sustainable, must be defended upon the general views of policy, based upon the consideration of the unequal situation of master and servant. Louisville & Nashville Railroad Co. v. Bowler, 9 Heis. 866. So if the servant incur the risk by the express direction or command of the master or his agent, and the danger was not inevitable or the necessary result of performing the service, it is a question for the jury to say whether the performance of the service was negligence in fact. Wood on Master and Servant, Sec. 378. The duty of the servant being obedience if the master orders him to perform a dangerous service, and he obeys, and is thereby injured, the law will not deny him a remedy on the ground of contributory negligence, unless the danger was so glaring that no prudent man would have entered into it, even where, like the servant, he was not entirely free to choose. 2 Thomp. Neg. 974.

The reason of the rule that the servant cannot recover damages if he continues to work with defective tools with full knowledge of the defects, is that being a free agent the law presumes that he will refuse to work with dangerous implements unless his compensation is proportioned to the risk. Every employment has its hazards which the employé necessarily assumes in accepting the service, or continuing in it with knowledge of any particular risk. It is negligence, therefore, on his part not to avoid or bargain for a known danger. The modification of the general rule suggested above, as made by some of the cases that the servant may recover for an injury occasioned by a defective tool of the defect of which he was aware, is difficult to maintain on principle. For it virtually changes the rule as to the free agency of the servant, and requires as has been said, that the master should be more careful of the servant than the servant is of himself. It has not been recognized in this State. The other modification that the servant may recover for an injury occasioned by a risk incurred by the direct command of the master or his agent, seems to be better founded both in reason and upon authority, in view of the duty of the servant to obey and the emergencies of business. But even in such cases the limitations are that the hazard must not be too glaring, and that the order must be in a matter as to which the servant has the

right to rely upon the superior judgment of the master. The exigency of the occasion may also be an important factor in a particular case. These elements did exist in *Railroad Co. v. Bowler*, 9 Heis. 866, where, as I am informed by my brother judges, a section boss ordered a section hand, upon a sudden emergency, to stand on the front edge of a flat car and attempt to connect it with another car which had become uncoupled, and was moving off more rapidly, and fell between the cars and was run over.

The mere fact, therefore, that the servant has remained in the service of the master with knowledge of a defect in the instrument used will not of itself as matter of law, exonerate the master from liability. It is evidence, and ordinarily conclusive evidence of contributory negligence on the part of the servant which will bar recovery. But the question of negligence, under the circumstances of a case, is for the jury. And the extent of the danger of the act, the fact that it is done under the direct order of the master or his agent, and the exigency of the occasion are essential elements in determining the question.

The proof in the case before us shows that there was an existing exigency for prompt action to finish the track in time for an expected train. The task was accomplished, the witnesses say, "by a hard push." There was occasion, therefore, for a peremptory order. The proof shows that the order was given by the section boss to the plaintiff below, as a section hand, to go to work at once with a defective instrument, and the testimony is not positive that the hazard was so glaring that a prudent man would not have risked it for the short period of the job. The trial judge, consequently, was not only warranted but required to say to the jury that, notwithstanding the general rule on the subject, it was for them to say whether the continuing to work with knowledge of the defective character of the hammer was, under the circumstances, such contributory negligence on the part of the servant as would deprive him of the right of recovery. And this is what he does in effect charge. He says to them that if you find that while engaged in his employment the plaintiff discovered the defective condition of the hammer, and complained thereof, but continued to work under the order of his immediate superior, and while doing so he was injured, you should find for the plaintiff. The exigency of the work and the extent of the hazard are not mentioned specifically, but these facts were before the jury by proof, and the charge may fairly be considered as made in view of them. A fuller charge which included these elements, as they might have been, would have been more favorable to the plaintiff. And the actual charge, when the law is applied to the particular facts, is correct as far as it goes.

His Honor, the trial judge, clearly erred in charging that: "The burden of proof is on the defendant to show that it pro-

vided plaintiff with tools and implements suitable, sufficient and safe as care and skill can make them;" and in refusing to charge, as requested by plaintiff, that: "The law presumed that the master had performed the duty the law imposes to furnish safe and suitable machinery; and the burden of proof is on the plaintiff to show that this duty has not been performed." But both the charge and the request were useless abstractions. The proof and the request were useless abstractions. The proof was clear, and furnished by the plaintiff, that the tool in question was not suitable, sufficient and safe, and the matter of the burden of proof was utterly immaterial. The real and only point of difficulty was that of the contributory negligence of the plaintiff in using the defective hammer with full knowledge of the defect. This is one of the most glaring instances of a prevailing fault in the charges of the circuit judges, the dealing in general and abstract propositions of law instead of coming down to the facts of the particular case.

The other requests of the defendant are open to the same objection. They are either abstract propositions or propositions which were only half truths, and useless in view of the only real issue. Thus the court was asked to charge as follows: "The servant is not required to inspect the appliances and tools to see if there is any latent defect, but he is bound to see such defects as one plain to the senses. Therefore, if Duffield, from any source, had the same information that defendant had touching the condition of the hammer complained of by him, he is bound to act upon it, and if he voluntarily remains after such knowledge, he is taken in law to have assumed the risk incident to the use of such instrument. The duty of the master in the first instance is to furnish safe machinery and tools, but if Duffield knew that the hammer was defective and unsafe to be used, and yet he used it, even if ordered to do so, he assumed all the risks incident to its use if he consented to use it without any assurance from the defendant that the object complained of should be repaired."

Now how could it be of the least importance to lay down the law in relation to the duty of a servant as to latent and patent defects, when the defect under consideration was patent, and fully known to the plaintiff, as he himself testifies? And what was the use of redrafting in a different form the general proposition already laid down in the charge that the use of a defective tool with the knowledge of the defect would prevent a recovery, when the sole point was whether the circumstances took the case out of the rule, and the court had expressly charged that they did if found. It seems like a useless consumption of time and paper.

Another request was: "The question is whether Duffield was guilty of negligence in performing the service after a knowledge of the defect. The fact that he has complained of the defect, if

no promise to repair was made, does not operate to relieve him of the charge of negligence, but may have directly the opposite effect. It is wholly a question of care or negligence, and if Duffield knew or ought to have known the danger, and a person of ordinary prudence would have regarded it as dangerous to try to use the hammer complained of, he cannot recover, even though he may have complained of its condition to the section boss." These are correct propositions as far as they go, but clearly of no use after a charge, as the general rule that use with knowledge would prevent recovery, and a modification of the rule which combined the facts embodied in the latter part of the paragraph with other facts, which in the opinion of the court, would give the right to recover.

Another request was: "Duffield, in order to recover, must take the burden upon himself of establishing negligence on the part of the railroad company, and also due care on his own part. He must introduce proof overcoming two legal presumptions, that is two presumptions of law: first, the presumption that the railroad company has discharged its duty by furnishing suitable and safe tools: and second, he must introduce proof to overcome the presumption of law that at the time he entered the service he assumed all the ordinary risks of the business. These are absolute burdens imposed on Duffield, and he is not relieved from the force of these presumptions by showing that any injury resulted to him in consequence of a defective tool employed in the business, but he must go further, and show that the defect producing the injury was not known to him, but was known, or should have been known to the railroad company. Failing to overcome these presumptions he cannot recover." Here are a series of presumptions to be overcome by showing that the defect of the hammer was not known to the plaintiff when the plaintiff's own testimony conceded that the defect was known to him. The request, therefore, reduced to its simplest elements, was this, that if the jury shall find that the plaintiff knew of the defect, and he admits that he knew of it, then he cannot recover. But the court had already told the jury that the plaintiff's knowledge of the defect was not conclusive upon his rights if they should find certain other facts. The request is not good law, and would have been utterly useless if correct as far as it goes.

The paragraphs of the charge, which are excepted to, in relation to the incompetency or misconduct of the section boss, and the duty of the company in selecting and employing careful servants, were mere abstractions, and if, as contended, there are no facts in the record upon which to rest them, they could not possibly do any harm. Very few verdicts would stand if the vague generalities which trial judges feel it their duty to indulge in so as to cover every possible view which may have been presented in the argu-

ment of counsel, were treated as fatal because there were no facts in evidence to sustain them. The real issue in this case was whether its peculiar facts took it out of the general rule that a servant cannot recover for an injury occasioned by a defect of which he was fully advised, and that issue was presented to the jury upon a charge less favorable to the plaintiff than he was entitled to.

The report of the Referees must be set aside, and the judgment affirmed.

Use by Servant of Defective Apparatus Knowing it to be such.—The general principle is that when the servant of a railroad company employs a tool or other appliance which he knows to be defective and unsafe he cannot recover for an injury occasioned thereby. His contributory negligence bars recovery. *Gibson v. Erie R. R. Co.*, 63 N. Y. 449; *Mehan v. S. B. & N. Y. R. R. Co.*, 73 N. Y. 585; *Ft. Wayne & C. R. R. Co. v. Gildersleeve*, 33 Mich. 133; *Crutchfield v. Richmond, etc., R. R. Co.*, 78 N. C. 300; *Ford v. Fitchburg R. Co.*, 110 Mass. 87; *Ladd v. Bedford R. Co.*, 119 Mass. 412; *Chicago R. R. Co. v. Munroe*, 85 Ill. 25; *Georgia R. R. Co. v. Kenney*, 58 Ga. 455; *Kroy v. Chicago, R. I. & P. R. Co.*, 32 Iowa, 357; *Michigan Central R. R. Co. v. Austin*, 40 Mich. 225; *Hamathy v. Northern, etc., R. R. Co.*, 46 Md. 280; *Hawley v. Northern Central R. Co.*, 2 Am. & Eng. R. R. Cas. 248; *Green & Coates St. Pass. Ry. Co. v. Bresmer*, 4 Am. & Eng. R. R. Cas. 647; *Pittsburg, etc., R. Co. v. Sentmeyer*, 5 Am. & Eng. R. R. Cas. 508; *Rains v. St. Louis, etc., R. Co.*, 5 Am. & Eng. R. R. Cas. 610; *Houston & T. C. R. Co. v. Myers*, 8 Am. & Eng. R. R. Cas. 114; *Louisville, etc., R. R. Co. v. Orr*, 8 Am. & Eng. R. R. Cas. 94; *Umbach v. Lake Shore & Mich. S. R. Co.*, 8 Am. & Eng. R. R. Cas. 98; *Sweeney v. Central Pac. R. Co.*, 8 Am. & Eng. R. R. Cas. 151; *De Forest v. Jewett*, 8 Am. & Eng. R. R. Cas. 495; *Houston & T. C. R. Co. v. Fowler*, 8 Am. & Eng. R. R. Cas. 504; *Mayer v. Chicago, etc., R. Co.*, 8 Am. & Eng. R. R. Cas. 527; *Watson v. Houston & Texas Central R. Co.*, 11 Am. & Eng. R. R. Cas. 213; *Jackson v. K. C. L. & S. K. R. R. Co.*, 15 Am. & Eng. R. R. Cas. 178; *East Tennessee, etc., R. Co. v. Smith*, 15 Am. & Eng. R. R. Cas. 224; *McQueen v. Central Branch N. Pac. R. Co.*, 15 Am. & Eng. R. R. Cas. 226; *Burlington, C. R. & R. Co. v. Coates, adm'r*, 15 Am. & Eng. R. R. Cas. 265.

When Servant is Ordered to use Defective Apparatus.—Where a servant is obliged by his superior officer to use defective tools or machinery, he is not guilty of contributory negligence though he knew of the defect. *Greenleaf v. Dubuque & S. C. R. Co.*, 33 Iowa, 52; *Patterson v. Pittsburgh & C. R. Co.*, 76 Pa. St. 389; *Snow v. Housatonic, etc., R. Co.*, 8 Allen, 441; *Clarke v. Holmes*, 7 Hurlst. & N. 937; *Dale v. St. Louis, etc., R. Co.*, 63 Mo. 455.

DOWELL

v.

VICKSBURG & MERIDIAN R. R. CO.

(61 *Mississippi Reports*, 519.)

A servant of a railroad company cannot recover in a suit against the company for injuries received while recklessly attempting to board a moving train, although it is shown that the train was improperly equipped and that some of its appliances were defective.

Under the above circumstances the fact that the plaintiff was in the habit of boarding moving trains, or that he had been seen to do so on previous occasions with impunity, will not avail him.

Section 1047 of the Mississippi Code of 1880 does not embrace employes among those to whom a right of action is thereby given when railroad companies run their trains at a higher rate of speed than six miles an hour through any town, city or village.

APPEAL from the Circuit Court of Lauderdale County.

The appellant, who was an employé of the Vicksburg & Meridian Railroad Co., received injuries while attempting to board a moving train of appellee, for which injuries he brought suit for \$10,000.

The declaration contains two counts; the first count charges the defendant with negligence, in having a broken step on the engine, which occasioned the plaintiff's fall, and in having an unskilful person in charge of the engine at the time of the accident. The second count charges that the train was at the time of the accident running at a greater rate of speed than six miles an hour within the corporate limits of the town of Meridian.

The proof shows that the plaintiff, on the 29th day of October, 1881, was a minor in his twentieth year and an employé of defendant. His business was to put new cross-ties and new rails in the defendant's road, and in moving from place to place he, with others in the same business, rode on a hand-car. He was a section hand, and his "section boss" was Mr. W. Mundell. Two days prior to the said 29th day of October, 1881, the assistant supervisor of the road, Barney Marion, ordered plaintiff, together with all of Mundell's force, to work on a certain "construction train" which worked the entire length of the road. On the said 29th of October, 1881, the train was working within two or three miles of the City of Meridian; in order to let a freight train go out from Meridian this work train with all the hands was brought into Meridian to get it out of the way of the freight. After getting into Meridian the plaintiff asked permission of his "boss," Mundell, to go over in town on private business, which was granted to him. He went over into town, keeping all the while within two hundred yards of his train. On hearing the freight go out he hastened on by way of the nearest street toward the point where he had left his train standing. The train, however, had started off before he could reach it, so he intercepted it at a point further down the track. His view of the moving train being obstructed by a small house near the factory, the ground being rough, and there being an embankment a few feet high to ascend, he gave his attention to these obstacles and obstructions rather than to the speed of the train, assuming and taking it for granted that it was moving at lawful speed—not more than six miles an hour—it being in the corporate limits of the city of Meridian. Having ascended the

embankment, he awaited the approach of the engine, which was already near to where he stood. The engine was running backward—tender foremost—pulling a train of five or six empty “flat cars” which were coupled on the pilot of the cow-catcher of the engine. The regular engineer, Mr. Hansell, was at the time not in his engine. The engine was being run by a negro named Jack Wharton, who professed to be only a “fireman,” but who, according to the testimony, had charge of this engine and train by direction of the defendant’s master machinist at Vicksburg, Mr. Brown, whose business it was to assign him his duties. The opinion of one witness is that this negro Wharton, was an incompetent engineer. On the occasion of the injury to plaintiff the train was running at the rate of ten or twelve miles an hour over the “switches.”

As the engine approached plaintiff he caught the “hand-holds” on the engine firmly with both hands, made a spring, and jumped up on the step, getting his foot in the step well, when suddenly his foot slipped off of the step, his hands broke loose from their hold, and he fell to the ground, his feet falling under the wheels of the engine, the engine and train passing over them and crushing them so that they had to be cut off just below the knees. Plaintiff did not know the train was moving as rapidly as it really was. The step off of which his foot slipped was broken. The part broken off was the front part of the guard, which stands up about an inch and a half high all around the edges of the step to keep the foot from slipping off. The step and guard are of iron. All engines have their steps protected or provided with this guard. Plaintiff had been on this train only two days and did not know of this defective step; had never been notified of it. The step had been broken five months.

There was no other provision made on that side of the engine for getting on, nor anywhere else on that side of the train. The “hand-holds” on the engine were low enough down to be caught hold of easily.

This injury was the cause of plaintiff losing both his legs. He is damaged \$10,000. Plaintiff says he is damaged \$1,000,000.

During the examination of plaintiff as a witness, the following question was asked him by his counsel:

“Do you know, and if so state, what the custom is among railroad employes in getting on and off trains while in motion?”

Defendant’s counsel objected to it being answered, the court sustained the objection, plaintiff excepted to the ruling, and the same is assigned as ground of error.

The witness Luke New was asked the following question by plaintiff’s counsel:

“State, if you know, whether or not Wm. E. Dowell, the plaintiff, knew how to get on a train while in motion?”

Also the following question :

“Did you ever see the plaintiff, Wm. E. Dowell, get on a train while in motion?”

To each of which defendant's counsel objected. Objection sustained and the court's ruling on each excepted to and assigned as error.

Another witness subsequent to this testified, without objection, that he “has seen railroad men board trains many times while running at that speed and never saw one get hurt before;” that he himself had gotten on trains running at that fast; while another witness swore that he himself would not have attempted what plaintiff did, and that he considered it risky.

The instructions asked by plaintiff were substantially as follows, *viz.* :

- (1) “That the defendant is liable to plaintiff for any damage or injury sustained from defendant's locomotive and cars and whilst they were running at a greater speed than six miles an hour through the corporate limits of the city of Meridian. Code 1880, Sec. 1047.”
- (2) “That defendant owed a duty and was under obligation to plaintiff to exercise reasonable care and prudence in the employment of fellow servants to be associated with plaintiff, and if defendant failed in this and plaintiff was thereby injured, then defendant is liable, unless the jury believe plaintiff was also negligent and contributed to it.”
- (3) “That defendant was under obligation and owed duty to plaintiff to exercise reasonable prudence in providing safe machinery, and if the jury believe that the step to engine was defective, and that by reasonable diligence defendant could have known of such defect, that plaintiff did not know of the defect and by reasonable diligence could not have discovered it, and that by the want of reasonable diligence on defendant's part in this respect plaintiff was injured, then the defendant is liable, unless plaintiff was negligent and contributed to it.”
- (4) “That defendant owed a duty to plaintiff as well as to the public imposed by statute not to run their trains at a greater rate of speed than six miles an hour through corporate limits of the city, and if defendant failed in performance of this duty, and by such failure plaintiff was injured then defendant is liable under first count, unless jury believe plaintiff was negligent and contributed to it.”
- (5) “While defendant is not liable for plaintiff's injury solely on account of plaintiff's fellow-servant's negligence, yet it is liable for injuries sustained in consequence both of defendant's own negligence and that of a fellow servant, if plaintiff by his negligence did not contribute to it.”
- (6) “That if plaintiff in attempting to board the train exercised that reasonable care and prudence which a prudent man under the same circumstances would have done, then he was not negligent, and in determining this the jury should consider the fact that plaintiff was going to his work, that his

habits and business had given him experience in getting on and off trains in motion, his age and maturity, etc." (7) "That if plaintiff did not know the train was running faster than six miles an hour and that under the same circumstances a prudent man would not have known it the plaintiff had a right to assume that said train was running at a speed not greater than six miles an hour, and the jury should consider this in determining whether he acted as a prudent man would have done under the same circumstances." (8) "Even if the jury believe plaintiff did not act as a prudent man would have done, yet if his negligence did not contribute as a proximate cause to the injury then it does not prevent his recovery." (9) "That if the engineer in charge of train was an unskilled engineer, that defendant knew of it, or could by reasonable diligence have ascertained it, and that by reason of said unskilfulness plaintiff sustained injury, then he must have damages, and in assessing them are warranted in considering his sufferings, etc., provided plaintiff's negligence did not proximately contribute to the injury." (10) "In estimating damages should consider plaintiff's bodily pain, loss of time, nature, extent and duration of injury, its effect on his health, mental and physical powers, his capacity to labor, etc." (11) "That if plaintiff was injured whilst train was running faster than six miles an hour through city limits, and if plaintiff's own negligence did not proximately contribute to injury, then defendant is liable."

The foregoing instructions, eleven in number, asked by plaintiff, were each and all refused by the court, to which plaintiff excepted.

The court thereupon instructed the jury for defendant as follows:

"Though the step was defective, and though the train was running at a greater speed than six miles an hour, yet the injuries to plaintiff are to be imputed to plaintiff's own negligence, and the jury are instructed to find for the defendant."

Dial & Witherspoon, for the appellant.

Nugent & Mc Willis, for the appellee.

CAMPBELL, C. J.—The circuit court properly instructed the jury to find for the defendant. A recovery by the plaintiff could not have been permitted to stand, and it was right to tell the jury so. The facts are undisputed and the inferences to be drawn from them are unmistakable. The plaintiff brought his misfortune on himself by his own recklessness and cannot visit its consequences on another. This is decisive against him under the first count of his declaration, and it would not have availed him to prove that he knew how to get on a train in motion, and had been seen to do it with impunity, and that it is customary for railroad men to do this.

Without deciding any other question under the second count,

we hold that the plaintiff was not entitled to recover because the statute on which it is based, Sec. 1047, Code of 1880, does not embrace employes among those to whom a right of action is given by it. This section and others in connection with it were brought forward from the code of 1857, and it was held in *N. O. J. & G. N. R. R. Co. v. Hughes*, 49 Miss. 258, that one of the sections did not include employes, and it must follow that the section under consideration does not embrace them. Aside from authority, we consider it better policy to deny to employes a right to recover for violations of law in which they are themselves the actors. The statute forbidding a greater speed than six miles an hour in towns is more likely to be observed by employes on trains if they are required to take all risk of violating it. To permit them to violate the statute and to derive advantage from it would serve to tempt to disregard it.

Affirmed.

Speed as to Employes.—The running of a train through a city or town at an unlawful rate of speed is no evidence of negligence as to the employe of the company. *Lockwood v. Chicago & N. W. R. Co.*, 6 Am. & Eng. R. R. Cas. 151.

NORTH CHICAGO ROLLING MILLS Co.

v.

MORRISSEY, Adm'x.

(*Advance Case, Illinois, Sept. 2, 1884.*)

In an action by the administratrix of a brakeman on a railroad train to recover damages for his death alleged to have been caused by the negligent construction of a wooden wall near the track which fell and crushed him, it is error for the court to entirely disregard in its charge the question of the contributory negligence of the decedent when this has been raised and is material.

In an action to recover damages for the death of a party alleged to have been occasioned by defendant's negligence, it is error to charge the jury that they may give such damages as they may deem a fair and just compensation for the pecuniary loss resulting from such death, without making reference to any proof of the amount of damages sustained.

APPEAL from Second District.

Willard & Driggs, for appellant.

Hynes, English & Dunne, for appellee.

SHELDON, J.—The appellee brought this action to the June term, 1881, of the superior court of Cook county, to recover damages consequent upon the death of her husband through alleged negligence on the part of the appellant.

The charge in the declaration is substantially that the defendant improperly, unskilfully and negligently constructed a certain wooden wall in dangerous and close proximity to a certain railroad track, and that the deceased whilst in the employ of the defendant as a switchman, riding with due care upon a certain locomotive, was struck by said wall and thereby thrown to the ground and killed. The plaintiff recovered a verdict and judgment for \$4,000. Judgment was affirmed by the appellate court for the first district and the defendant took the present appeal to this court.

It appears from the evidence that the wall in question formed one side of a coal bin which was designedly constructed by the defendant in near proximity to a certain railroad coal track on its premises for the purpose of enabling coal to be shoveled by hand directly into the bin from cars standing on the track. The coal bin extended along the track about three cars length beyond and adjoining which was a coke shed or bin which extended along the same track about six car lengths to the end of the track. The cars were handled by means of steam locomotive engines, of which the defendant had two or more working day and night. Cars were thus placed upon and taken off this coal track three or four times per day, and the process of shoveling from the cars into the bin caused quantities of the coal to fall between the two, and the defendant always had a man employed who, standing between the cars and the bin, shoveled up the scattering coal and threw it into the bin. Such had been the use of the track and bin since 1863, during which time no accident or injury had occurred in consequence. At the time of the accident the switchmen of whom deceased was one, were placing upon this coal track in the usual manner a train of five or six cars to be unloaded, the engine running about three miles per hour.

Among the errors assigned is the giving of the following instruction for the plaintiff:

The jury are instructed that the plaintiff cannot recover unless she has proved that she is the administratrix of the estate of the deceased Michael Morrissey, and that he, the deceased, left him surviving a widow and next of kin, who have suffered pecuniary loss by his death, yet if they believe, from the evidence in this case, that the plaintiff is the duly appointed administratrix of the estate of deceased, and that he, the deceased, left him surviving a widow and next of kin, who have suffered pecuniary loss by his death, and that under the instructions and evidence the defendant is guilty as charged in the declaration, they should find for the plaintiff, and may give such damages as they shall deem a fair and just compensation for the pecuniary loss resulting from such death to the widow and next of kin of deceased, not exceeding \$5,000.

The question of contributory negligence was raised, and was a

very important one in the case. This instruction entirely ignores the question of contributory negligence. It purports to be complete in its statement of what will authorize a recovery, and omits the requirement of any care or caution on the part of the deceased. In this respect the instruction is erroneous, as we have heretofore repeatedly held. *C. B. & Q. R. R. Co. v. Harwood*, 80 Ill. 88; *C. & N. W. R. R. Co. v. Dimick*, 96 *id.* 42; *Wabash, St. L. & P. R. R. Co. v. Shacklet*, 105 *id.* 364; *City of Peoria v. Simpson*, 110 *id.* 294.

The instruction is objectionable in another respect under the decision in *C. B. & Q. R. R. Co. v. Sykes*, 96 Ill. 162, in that it allowed the jury to give such damages as they should deem a fair and just compensation, regardless of the proof. Such a clause in an instruction in that case was condemned and it was said of it, "this part of the instruction leaves the jury at liberty to find any amount not exceeding the amount claimed, without the slightest reference to any proof of the amount of damages sustained."

Where the verdict of the jury is not more satisfactory upon the evidence than it is in the present case, this court has always insisted upon the importance of accuracy in the instructions to the jury.

For the error in the giving of the above instruction the judgment will be reversed and the cause remanded.

Judgment reversed.

WALKER, J.—I dissent from this opinion.

DIOKEY, J.—I do not think this instruction is objectionable. It does not purport to give all the facts necessary to warrant a verdict of guilty. Its purpose was to show that certain proofs as to the plaintiff being administratrix and as to there being next of kin—who suffered pecuniary loss and to give the measure of damages—in case plaintiff otherwise made out the case alleged in the declaration—which included the exclusion of contributory negligence. I incline to think the judgment ought to be reversed upon other grounds, which I have not time to specify at present—and as a majority sustain this opinion it may not be important that I should do so.

Damages in Actions for Negligence Causing Death.—In an action to recover damages for a death caused by negligence it is the duty of the court to give some specific directions as to the measure of damages and not to leave the whole question to the jury. *Chicago, B. & Q. R. Co. v. Sykes*, 2 Am. & Eng. R. R. Cas. 254; *Burlington, C. R. & N. R. R. Co.*, 15 Am. & Eng. R. R. Cas. 265.

SIMMONS, Adm'r,

v.

CHICAGO & TOMAH RAILROAD COMPANY.

(110 *Illinois Reports*, 340.)

An employé of a railroad company was killed by the falling of a bank of earth which he was engaged in excavating. His administrator brought suit for damages against the company, on the alleged ground of a want of proper care on the part of the agents of the company in charge of the work. The facts were substantially these: A number of laborers were engaged in excavating a hill, under the direction of a foreman. The bank, at the point where the accident occurred, was sixteen to twenty feet high, and composed of clay. The deceased was twenty-eight years of age, an old miner in the neighborhood, and accustomed to work in that kind of earth. The manner of doing the work, and as directed by the foreman, was undermining the bank by digging under from two to three feet, and prying the bank off from the top. That was not the proper and safe way to take down the bank. The foreman had control of the men, and could discharge them for disobedience of orders. On the morning of the accident, the foreman, as he was about to go elsewhere, cautioned the men about the danger. Two days previously the superintendent of the road told the men that the way they were doing the work was dangerous—that they must not cave it off that way, and that they must not dig under so far. In the forenoon of the accident several of the men, the deceased himself included, were speaking of the bank getting dangerous. One man left the place on that account, and another went to work somewhere else. This the deceased could have done if he had desired, as he was not required to work at that particular place, but chose it for himself; and continuing to work there the bank fell upon him and killed him. The court below, on this state of case, excluded all the plaintiff's evidence from the jury, and directed a verdict for the defendant. *Held*, that this was proper. There was no sufficient ground of recovery, the deceased having voluntarily continued in the place of danger with full knowledge of the peril he was in.

APPEAL from the Appellate Court of the Second District; heard in that court on appeal from the Circuit Court of Jo Daviess county.

M. Y. Johnson and *James S. Baum*, for appellant.

B. C. Cook, for appellee.

SHELDON, C. J.—This suit was brought to recover damages for the death of Edward C. Simmons, who was a laborer in the employ of the Chicago & Tomah Railroad Company, and was engaged, at the time of being killed, with others, in removing a bluff or hill in the city of Galena, for the purpose of preparing the foundation for a round-house, and for laying a side-track. There had been a former trial, resulting in a verdict and judgment in favor of the plaintiff, which judgment, on appeal to the appellate court for the second district, was reversed. At a second trial be-

fore a jury, upon the close of the plaintiff's evidence, the court, on motion of the defendant, withdrew the plaintiff's evidence from the jury, and directed them to find for the defendant. The jury so found, and judgment was entered in favor of the defendant, which, on appeal to the appellate court, was affirmed, and plaintiff appealed to this court.

The declaration alleged as ground of action, in the first count, neglect of the alleged duty on the part of defendant to direct and cause the work about which the deceased was employed, to be done in a prudent and safe manner, and so as not to endanger the lives of the employes engaged in the doing of the work, by reason whereof a large mass of earth, forming part of a hill which was being dug down under defendant's direction, became detached, and fell upon and killed the decedent. The second count alleges negligence in the employment of competent persons to superintend and oversee the doing of the work.

The evidence showed the following facts: The deceased was twenty-eight years of age, an old miner in that neighborhood, accustomed to work in that kind of earth. The railroad company was engaged in excavating a hill to build a round-house. From thirty to fifty men were engaged in the work. They were in two gangs, of which Decker and Briggs were the respective foremen. The full length of the bank was between 200 and 300 feet. The bank was sixteen or twenty feet high at the west end, where the accident occurred. It was nearly perpendicular, and composed of clay, commonly called "joint clay." The manner of doing the work was undermining the bank by digging under from two to three feet, and prying the bank off from the top by bars. That was not the proper and safe way to take down the bank. It should have been taken down from the top, or pillars should have been left to support the bank. Briggs and Decker were the men put in charge by the superintendent of the railroad, and directing how the work should be done. Each foreman had control of his own men, and for disobedience of orders could discharge them. When one foreman was absent, the other directed both gangs. Deceased was in Briggs' gang. Briggs, on the morning of the accident, went somewhere else, and left his men with Decker and saying to them: "Boys, look out for yourselves to-day. I am going to work off here. Don't get covered up." The superintendent of the road was at the bank two days before the accident, and he told the men that the way they were doing the work was dangerous; that somebody would get hurt; that they must not cave it off that way, and that they must not dig under that far. In the forenoon of the accident several of the men there were speaking of the bank getting dangerous. The deceased himself said the bank was getting dangerous. One man left the place on account of it, and another on the same account avoided going there, and went

to work somewhere else. The deceased was at work at the west end of the bank, shoveling out dirt from under the bank. The bank ran out to a point at the east end. The deceased was not directed to work at that particular spot where he was working—he chose it himself, and he might have worked at any other place on the bank. The bank fell in the forenoon of November 24, 1880, some twenty or twenty-five feet of it, lengthwise, killing the deceased.

There may be decisions to be found which hold that if there is any evidence—even a scintilla—tending to support the plaintiff's case, it must be submitted to the jury. But we think the more reasonable rule, which has now come to be established by the better authority, is, that when the evidence given at the trial, with all inferences that the jury could justifiably draw from it, is so insufficient to support a verdict for the plaintiff, that such a verdict, if returned, must be set aside, the court is not bound to submit the case to the jury, but may direct a verdict for the defendant. *Pleasants v. Fant*, 22 Wall. 120; *Randall v. Baltimore & Ohio R. R. Co.*, 109 U. S. 478; s. c. 15 Am. & Eng. R. R. Cas. 243; *Metropolitan Ry. Co. v. Jackson*, 3 App. Cas. 193; *Reed v. Inhabitants of Deerfield*, 8 Allen, 524; *Skellenger v. Chicago & Northwestern Ry. Co.*, 61 Iowa, 714; *Martin v. Chambers*, 84 Ill. 579; *Phillips v. Dickerson*, 85 *id.* 11. In the recent case of *Frazer v. Howe*, 106 Ill. 573, this court recognized the rule to be: "If there is no evidence before the jury on a material issue in favor of a party holding the affirmative of that issue, on which the jury could, in the eye of the law, reasonably find in his favor, the court may exclude the evidence, or direct the jury to find against the party so holding the affirmative."

There was no evidence whatever tending to support the second count of the declaration.

The alleged ground of action in the first count is negligence of the defendant in not having the work done in a safe manner. The evidence shows there was a more proper way of doing the work, and one which would have been safe. But the liability of the defendant does not thence result. In *Pennsylvania Co. v. Lynch*, 90 Ill. 334, this court said, that while there is an implied contract between employer and employé that the former shall provide suitable means, appliances and instrumentalities with which to perform the labors required of the latter, and also that the latter shall be advised by the former of all the dangers incident to the service of which the latter is not cognizant, "yet the failure of the employer in this regard furnishes no excuse for the conduct of an employé who voluntarily incurs a known danger. He must himself use due care and caution to avoid injury. If he has full knowledge of all the perils of a particular service, he may decline to engage in it, or require that it shall first be made safe; but if he

does thus enter it he assumes the risk, and must bear the consequences. And in *St. Louis & Southeastern Ry. Co. v. Britz*, 72 Ill. 261, there was approval of the rule laid down in *Wharton on Negligence*, Sec. 214, that "when an employé, after having the opportunity of becoming acquainted with the risks of his situation, accepts them, he can not complain if he is subsequently injured by such exposure." To the same effect are *Clark v. Chicago, Burlington & Quincy R. R. Co.*, 92 *id.* 43, and *Camp. Point Manf. Co. v. Ballou*, 71 *id.* 418.

If a servant, knowing the hazards of his employment, as the business is conducted, is injured while engaged therein, he can not maintain an action against the master for the injury merely on the ground that there was a safer mode in which the business might have been conducted, the adoption of which would have prevented the injury. Many cases affirming this principle are cited in the brief of counsel for defendant. It was expressly laid down in *Naylor v. Chicago & Northwestern Ry. Co.*, 53 Wis. 661, —a parallel case with this in its facts, of an injury from the fall of a bank of earth under which plaintiff was excavating. In *Morey v. Lower Vein Coal Co.*, 55 Iowa, 671, (a case of injury to a miner by the falling of the roof of the mine,) it was laid down: "The true rule is, that if the plaintiff knew, or by the exercise of ordinary care might have known, of the unsafe condition of the roof of the mine, and he continued to work in a dangerous place without protest or complaint, and without being induced to believe that a change would be made, he assumed the risk, and can not recover." In *Hughes v. Winona & St. Peter R. R. Co.*, 27 Minn. 137, the Supreme Court of Minnesota sanctioned the rule that "if a man engage in a service, and continues in a service, with a full knowledge of the manner in which his employer conducts his business, and without objection, he is deemed in law to have assumed and taken upon himself all the risks naturally incident to conducting business in that way, even although it be unsafe." In the present case the danger was as apparent to the deceased as to any one. The condition of the bank was as open to his observation as to that of the foreman. He had been warned of the danger and he expressed his own belief of the danger. He might have left the particular place where he was, as did one other of his fellow-laborers on account of the danger, or have avoided going to that place, as did another one for that same reason.

Respecting knowledge, the court, in *Naylor v. Chicago & Northwestern Ry. Co.*, above cited, in commenting on the evidence there remarked, with entire pertinency to the present case: "The plaintiff is, presumably, a man of ordinary intelligence. He was cognizant of the practical effects of the law of gravitation, and knew that when a bank of earth was undermined by removing its foundation, it is liable to fall. Such knowledge is not confined to

experts. No one knew better than himself the extent to which the bank had been undermined, or could better judge of the peril," and holding that being fully informed of the peril the plaintiff had no cause of action. Fully seeing the danger here, the deceased voluntarily exposed himself to it, and he must be held to have assumed all the risk of working where he did, and plaintiff must bear the consequences.

Under the evidence of this case there was no cause of action, and the court ruled properly. The judgment must be affirmed.

Judgment affirmed.

WALKER, J.—I am unable to concur in the reasoning or conclusion in this case. I regard the opinion as in direct conflict with many previous decisions of this court, and virtually deprives parties of trial by jury, and substitutes the court for a jury. I therefore dissent *toto cælo*.

DICKEY, J.—I think it a question of law whether there is any evidence tending to prove a given allegation, and that it is a question of fact whether a given amount of evidence is reasonably sufficient to sustain such allegation. The former is a question for the court, the latter a question for the jury, subject to revision by the court on a motion for a new trial. I therefore cannot concur in the proposition that though there may be some evidence tending to prove every essential allegation of a plaintiff, the court may properly take the case from the jury and direct a finding for defendant, merely because, in the judgment of the court, the evidence in support of some material allegation is not reasonably sufficient *in force* to sustain a verdict for plaintiff.

RASMUSSEN, Adm'r,

v.

CHICAGO, R. I. & P. R. Co.

(*Advance Case, Iowa, Dec. 5, 1884.*)

A servant of a railroad company was employed as a shoveler in loading a dirt train. A switch had been run close to a bank which said servant in company with others was engaged in undermining. When the bank fell the loose earth was loaded on the car. The servant had been engaged for some time on this work without objection, but upon one occasion was killed by the bank falling on him. In an action by his administratrix to recover damages for his death, *held*, that decedent must be held to have assumed all the risks of his employment and that hence there could be no recovery.

APPEAL from Pottawattamie Circuit Court.

This is an action to recover damages of the defendant for the death of one Larsen, who, it was alleged, was killed by the falling of a bank of earth at which he was engaged in shoveling dirt.

It is alleged that there was mismanagement and negligence in the company in the construction of the side track, in use at the bank, so close to the bank as to interfere with the escape of the shovelers when the bank caved and fell, and that there was negligence in the manner in which the bank was worked, and that by means of such mismanagement and negligence the deceased was killed, and that the injury was occasioned without fault or negligence on his part. At the conclusion of the introduction of plaintiff's evidence the defendant filed a motion for the court to direct the jury to return a verdict for the defendant, upon the grounds that there was no evidence showing any of the acts of negligence charged, and that the evidence showed without conflict that the deceased was guilty of contributory negligence, and that he assumed all the risks incident to the service in which he was engaged. The motion was sustained and a verdict returned for the defendant, upon which judgment was rendered. Plaintiff appeals.

E. A. Babcock, for appellant.

Thos. S. Wright and *Wright & Baldwin*, for appellee.

ROTHROCK, C. J.—It appears from the evidence that the deceased had been in the employ of the defendant for about one year. His employment was that of a shoveler in loading and unloading a gravel or dirt train. A switch was laid to a bank of earth near Avoca in the fall of 1879, and the deceased and the crew with which he was connected were engaged from that time until the accident happened in moving earth with an engine and train from the embankment, and depositing it at another point in the road. The work was done by undermining the embankment and allowing the dirt to fall, and then loading it upon the cars with shovels. This undermining was the mode adopted to bring the earth down. The accident which resulted in decedent's death occurred in January, 1880. On that day, he, with others of the gang, was engaged in undermining the bank, and part of it fell upon him and he was instantly killed. There is not one word of evidence that he at any time made any objection to the manner in which the work was done. On the contrary, it affirmatively appears that he assisted in creating whatever danger there was in undermining the bank, and he must have seen and known, as clearly as any one, the results likely to ensue from the work he and others did at the bank. The switch track was laid near the bank, so that the dirt could be conveniently loaded upon the cars. The evidence does not show that there was any negligence in laying it too close to the bank, or that it could have been properly laid at any greater distance from the bank.

There was no conflict in the evidence, and we think, as matter of law, the plaintiff was not entitled to recover, and that the court correctly directed a verdict to be returned for the defendant.

Affirmed.

CROWLEY

v.

BURLINGTON, C. R. & N. R. Co.

(Advance Case, Iowa, September 18, 1884.)

Where a railroad car is propelled on a track at an immoderate rate of speed, and a laborer employed about such track, who is near being run over, jumps to get out of the way, and inadvertently steps upon ice and slips and is run over, it cannot be said, as a matter of law, that the improper speed at which the car was propelled was not the proximate cause of the accident.

The rule which requires a traveler about to cross a railway track to look in both directions for approaching trains is not applicable, in its strictness, to an employé at work on the track, because such an obligation would be inconsistent with proper attention to his work.

Instruction that the city ordinance regulating the rate of speed at which cars should be run was applicable to the place where the injury in this case was inflicted, *held* proper.

APPEAL from Benton District Court.

The plaintiff seeks to recover damages by reason of the alleged negligence of the employés of defendant, whereby plaintiff was struck and injured by a moving car. There was a trial by jury, and a verdict and judgment for the plaintiff. Defendant appeals.

J. & S. K. Tracy, for appellant.

Bowman & Swisher, for appellee.

ROTHROCK, C. J.—The plaintiff was employed by the defendant as a laborer in cleaning snow and ice from its tracks and switches, and he claims that on the ninth day of February, 1881, while so employed in the yard of defendant at the city of Cedar Rapids, the defendant negligently caused one of its cars, with great force, and at a speed in violation of the ordinances of said city, to strike plaintiff and to run on and over his right arm, by which he was greatly injured, and that such injury was received without any negligence on his part. The answer, in addition to a general denial, avers that if plaintiff was injured by a moving car it was by his own want of proper care and caution in not looking and listening for moving cars, and in not keeping out of the way of such cars.

The plaintiff was a witness upon the trial, and his testimony, as abstracted by appellant, is as follows: "I am plaintiff in this suit. Am fifty-one years old and live at Cedar Rapids. At the time of the accident I was working for defendant as a section hand in its yards at Cedar Rapids, cleaning out snow from the switches. There was a little ditch at the switch I was cleaning out, so the water could run through. Just before I got hurt I was standing

outside of the track, between it and a snow-bank, which was three or four feet high, at the side of the track, cleaning this ditch. I always looked every once in a while. I was very careful and looked out for myself, because I was a little hard of hearing, and it made me more cautious to look out. It had been thawing, the snow had melted, and the water was running. The accident happened in the afternoon, at about three or four o'clock. A car came along and was pretty close to me, when I raised my head and looked. I then jumped to get out of the way of the car, and my foot slipped or caught in some way, I can't tell how, and before I could get out of the way the car came up and hit me, knocked me down on my face and hands, and broke my arm in three places. I had been working for the company about four years. At the time I got hurt I was getting one dollar and twenty-five cents per day. My arm is very painful yet, and I suffered awfully, and can hardly do anything at all. I had been working about two months in this yard before I got hurt. There is a great deal of switching done there in the yard, and cars are moved up and down constantly, and hence it is a dangerous place to work unless you look out and watch. At the time I was cleaning the snow out of the track and this little ditch, and was standing on the west side of the track, between the snow-bank and the track. The track is nearly straight there. You can look down the track (south) some two or three hundred yards. You can see the track down to the switch target. I did not see this car coming until it was close onto me. Then I attempted to get away from the track, and my foot slipped, and the car struck me. I was outside of the track, between it and the snow-bank, when I slipped and fell."

The plaintiff, in an additional abstract, sets forth the following as an amendment to his testimony: "During February, 1881, at the time I got my hurt, I was section hand or repairsman on the B., C. R. & N. Ry., and my run was from Cedar Rapids to Linn Junction. I went out on the line on a hand car. I was under the direction of an overseer or boss. I was directed by the boss, on the morning of February 9th, to clear the switches on the track, so that the water would go from the switches. When I was clearing out the switches there was a bank of snow beside the track. I was cutting a drain through the bank of snow to let the water from the switch into the street. At the time the car struck me, as near as I can remember, I was standing with my face towards the track, on the outside, kind of half towards the track—in between the track and bank of snow. The bank of snow was between three and four feet high. The water was running that day. I was out in the middle of the afternoon, about three or four o'clock."

The foregoing was all the testimony given by plaintiff as to the cause of the accident, and all the witnesses testified substantially to the same facts. There was a conflict of evidence as to the

speed with which the car was moving at the time of the accident, but the jury was warranted in finding that it was running at the rate of from ten to twelve miles an hour. By an ordinance of the city, which was introduced in evidence, no car or engine was permitted to run along any railroad track in the city at a greater rate of speed than six miles per hour. At the close of the introduction of plaintiff's evidence, the defendant moved the court to direct the jury to return a verdict for the defendant. The motion was overruled. The defendant excepted to the ruling, and now claims that it was erroneous.

It is claimed that the evidence shows that the plaintiff was outside of the track and away from danger, and that he slipped and fell on the snow and ice and thus came in contact with the car; and it is urged that the speed of the car was not the proximate cause of the injury; but it was caused by the plaintiff's slipping and falling after he was out of danger.

We do not regard the evidence as at all clear upon this point. It does not appear that the plaintiff was run over by the wheels. He received his injury by a collision with some part of the car. But if we were to concede that he was out of danger and slipped, and thus came in contact with the car, we do not think that it can be said that the speed of the car was not the cause of the injury. It is not claimed that the company was negligent in allowing the snow and ice to remain so near the track; but those alone would not have created the danger. If such snow-banks and ice must exist in close proximity to the track, and where the employes of the company must do their work, there is the more necessity for a prudent movement of the trains and engines among them.

The plaintiff testified as follows: "I jumped to get out of the way of the car, and my foot slipped or caught in some way." We think it was a fair question for the jury whether, if the car had been moving at a proper rate of speed, the plaintiff might not have moved out of the way with such deliberation and care that he would not have fallen. If a horse is improperly driven upon a street, and a person who is near being run over jumps to get out of the way and inadvertently steps upon ice and slips and is run over, it cannot be said, as a matter of law, that the improper speed with which the horse was driven was not the proximate cause of the accident. It is true that the accident might have happened if the car had been allowed to approach him only at a proper rate of speed. No one can determine with certainty how it would have been. We think that was a question to be determined by the jury, in view of all the circumstances shown.

Again, it must be remembered that the plaintiff did not bear the relation of a stranger to the defendant. He was not on the track and in a place of danger for his own convenience, curiosity or pleasure, nor even as a traveler at a crossing. He was an employé

of the defendant, and was at his post of duty. There was a great deal of switching done in the yard, and the evidence shows that "cars are moved up and down constantly," and that it is a dangerous place to work. The plaintiff's duty required him to do the work he was placed there to perform, and he had a right to suppose that the defendant would exercise care to avoid sending cars along the track at an inordinate and unlawful rate of speed.

In *Ominger v. N. Y. Central & H. R. Ry. Co.*, 4 Hun. 59, it is held that the rule which requires a traveler about to cross a railway track to look in both directions for approaching trains is not applicable, in its strictness, to an employé at work on the track, because such an obligation would be inconsistent with his proper attention to his work. In *Goodfellow v. B. H. & E. Ry. Co.*, 106 Mass. 461, the plaintiff was in the employ of a contractor at work for the defendant. He was holding the guy of a derrick, and an engine backed down and injured him. At the trial a verdict was directed for the defendant, and the ruling was reversed. The court said: "There is evidence that he was rightfully where he was, and was not in fault in being engrossed in his work and unaware of the approach of the engine until it was too late to avoid it." We do not think the court erred in overruling the motion.

It is further claimed that the court erred in instructing the jury that the ordinance restricting the running of cars in the city at a rate of speed not more than six miles an hour applied to the switch-yards of the defendant. It is said that the ordinance is applicable only to that part of the city used by the public. This would limit the operation of the ordinance to such places as the public have a right to travel, which would include only public crossings. We do not think it should be so limited in its application.

There are other objections to instructions given, and to the refusal to give instructions asked, which we do not deem it necessary to discuss in detail. None of them appear to us to be well taken. We think that the case was fairly tried and presented to the jury, and that the verdict is fully supported by the evidence.

Affirmed.

Care Required of Workman Employed in Repairing Track.—As to the measure of care required on the part of servants of the railroad company engaged in repairing the track to watch for trains, see the following cases: *Kelly v. Union Ry. & Transit Co.*, 11 Mo. App. 1; *Goodfellow v. B. H. & E. Ry. Co.*, 106 Mass. 461; *Schultz v. Chicago & N. W. Ry. Co.*, 44 Wisc. 688; *Dick v. Indianapolis C. & St. L. Ry. Co.*, 88 Ohio St. 889; s. c. 8 Am. & Eng. R. R. Cas. 101.

KNAPP

v.

SIOUX CITY & P. R. Co.

(Advance Case, Iowa, October 24, 1884.)

K., a locomotive engineer, was running a train on defendant's road, when, by reason of the defective condition of the rails, they spread, and a part of the train was thrown from the track, and K., to protect himself and the property under his charge, reversed the lever to stop the train, and in so doing broke his arm. K. sued the company for damages, and the court directed a verdict for defendant. *Held*, that it could not be said as matter of law that the negligence of the railroad company was not the proximate cause of the injury, and that the case should have been submitted to the jury.

APPEAL from Pottawattamie District Court.

The plaintiff is a locomotive engineer, and was in the employ of the defendant, and the petition states that while the plaintiff, as such engineer, was in charge of a locomotive drawing a train of cars over defendant's road, the "locomotive and train were thrown from the track," and the plaintiff's right arm broken; that the "accident was caused by the negligence and faulty construction of the track; * * * that the ties were rotten, and insufficient to hold the sleepers and rails, or weight of a passing train;" and that the accident was not caused by the negligence of the plaintiff. The material allegations of the petition were denied. Trial by jury, and judgment for the defendant. The plaintiff appeals.

Sapp, Lyman & Pusey, for appellant.

Wright & Baldwin, and *Joy, Wright & Hudson*, for appellee.

SEEVERS, J.—The material question presented in this record is whether the negligence of the defendant was the proximate cause of the injury received by the plaintiff. The evidence tended to show that the rails spread, and a portion of the train left the track. The locomotive remained at least partly on the track. The train consisted of the engine and several freight cars. When the plaintiff found the train was about to run off, or that a portion of it was off the track, he caught the lever, and, in reversing it, his arm was broken. His object in reversing the lever was to check as soon as possible the speed of the train. At the conclusion of the plaintiff's evidence the defendant filed a motion which is in these words: "Now comes the defendant and moves this court to instruct the jury to return a verdict for the defendant, and for grounds of said motion states (1) that the

undisputed testimony discloses that the injury for which the plaintiff seeks to recover in this case was received by plaintiff while reversing his engine, and that the risk of accident in the operation of the engine is one incident to the employment, for which plaintiff has no right of action; (2) that plaintiff has not shown that the defective ties and track occasioned the injury complained of, but that the same occurred and was sustained while reversing the engine." The motion was sustained and the jury instructed accordingly.

It will be observed the petition states that the accident which caused the injury was caused by the locomotive and train being thrown from the track, and counsel for the appellee insist that the evidence shows that the engine did not leave the track, and that it affirmatively appears the injury was the result of the act of the plaintiff in reversing the lever, and therefore there is a material variance between the allegations of the petition and the proof. For this reason it is insisted the court rightly directed the jury to find for the defendant. It must be presumed that the court gave the direction asked on the grounds stated in the motion. It does not appear therefrom that the defendant claimed in the district court there was a variance, and that for this reason the jury should be directed to find for the defendant. Such question cannot be raised for the first time in this court. Had the motion been based on such ground the right to amend would have existed. It would be manifestly unjust to deprive the plaintiff of such right. This, however, would be the effect if we should affirm the judgment of the district court.

The plaintiff was injured while he was reversing the lever. There is no evidence tending to show that this was rendered more difficult because the train or a portion of it was off the track. If the lever had not been reversed, it cannot be said the plaintiff would have been in any respect injured. It must, however, be assumed that when a train leaves the track, the lives of the employés are endangered. The lever is moved forward, as we understand, for the purpose of starting the train or increasing its speed, and is reversed when it is desired to stop the train as speedily as possible. This forward and backward movement of the lever, no doubt, frequently occurs in a day's run. The use, therefore, of the lever must be regarded as one of the incidents and hazards of the plaintiff's employment, and for an accident happening by such use, by which the engineer is injured, it will be conceded the defendant cannot ordinarily be held liable. The immediate cause of the injury received by the plaintiff was the reversal of the lever. The lever was reversed because the train left the track, and this was caused by the spreading of the rails caused by the defective condition of the track. There was, therefore, a combination of immediate causes remotely preceded by others.

No event can occur, it is believed, which is entirely independent. "The links in the chain of causation are endless." The law has adopted a practical rule that the proximate cause of an injury only can be recognized. When it is ascertained further inquiry is closed. The real difficulty lies in the application of the rule. An eminent judge has said: "The general rule of law, we understand, is that where two or more causes concur to produce an effect, and it cannot be determined which contributed most largely, or whether, without the concurrence of both, it would not have happened at all, and a particular party is responsible only for the consequences of one of these causes, a recovery cannot be had because it cannot be judicially determined that the damage would have been done without such concurrence; so that it cannot be attributed to that cause for which he is answerable." Shaw, C. J., in *Marble v. City of Worcester*, 4 Gray, 395. The same rule has been more briefly stated by Beck, J., in *Dubuque Wood & Coal Ass'n v. City and County of Dubuque*, 30 Iowa, 176. Conceding this to be a correct statement of the law, we have to inquire whether the district court correctly applied it to the facts of this case, and we feel constrained to say that, in our opinion, it did not.

Ordinarily, trains remain on the track. If they do not, it must, ordinarily, be assumed it was caused by the negligence of some one, unless the accident appears to have been inevitable. In this case it must be assumed that the negligence of the defendant caused the train to leave the track. The plaintiff was called on in a sudden emergency to act. It cannot be expected that he would remain passive. He was justified in so acting as to best protect himself and preserve the property under his charge. If he had sprung from the engine to the ground and been injured, he undoubtedly could have recovered, provided he acted prudently in so doing. *Buel v. New York Cent. R. Co.*, 31 N. Y. 314; *Coulter v. American Exp. Co.*, 5 Lans. 67. Instead of doing this he concluded to reverse the lever. Now, whether this was the proper thing to do, and whether the plaintiff was negligent in so doing, it was for the jury to say. Conceding the plaintiff was not negligent, and that the injury was not received because of inevitable accident, then, it must follow, the negligence of the defendant caused the injury. True it is, that reversing the lever is one of the ordinary hazards of plaintiff's employment; yet, if the negligence of the defendant required such act to be done at that particular time, and the plaintiff was not guilty of negligence, but, on the contrary, acted prudently, with due regard for his own safety and the safety of others, then the defendant is liable, because the negligence of the defendant is the proximate cause of the injury.

We are unable to distinguish this from the "Squib" case, which was decided years ago, and has been frequently referred to. In

that case a squib was thrown from place to place, until finally a person was injured by it. The first person who so threw the squib was held liable for the injury. *Scott v. Shepherd*, 2 W. Bl. 892. Each person subsequent to the first threw the squib to protect himself and his property from injury. So, here, the plaintiff reversed the lever to protect himself and the property under his charge from consequences which would probably follow the negligent act of the defendant. See, also, *Palmer v. Andover*, 2 Cush. 600; *Allen v. Hancock*, 16 Vt. 230; *Woodward v. Aborn*, 35 Me. 271; It may possibly be true, as suggested by counsel for the defendant, that if the plaintiff had been injured as he was while reversing the lever for the purpose of stopping the train to prevent it from running over cattle on the track, that the defendant would not be liable, although the cattle got on the track because it was not fenced. It is sometimes exceedingly difficult to determine to which class a case belongs. But there is, and must of necessity be, a dividing line. It may, apparently, in some cases, have the appearance of being arbitrary. This cannot be avoided. But, we think, the failure to fence would be more remote from the immediate cause of the accident than in the case at bar. Besides this, to reverse the lever for such a cause might well be regarded as one of the ordinary hazards.

Reversed

MADDEN

v.

MINNEAPOLIS & ST. L. RY. Co.

(*Advance Case, Minnesota, July 18, 1884.*)

The road of defendant having got into bad condition it was engaged in general repairs of the same by resurfacing and taking up the old and putting down new ties and rails. Plaintiff was in its employment as a brakeman on a gravel train engaged in drawing gravel for the purpose of such resurfacing, and while so employed was injured by a car on which he was acting as brakeman running off the track in consequence of its bad condition. *Held*, that the rule that it is the duty of a master to use reasonable care and skill to furnish his servants safe and suitable instruments and means to perform the service in which they are engaged applies in the case. In that regard the duty of the master and assumption of risk by the servant are the same in case of employment to make repairs as in any other employment.

Evidence considered, and *held* sufficient to justify a finding that plaintiff did not know, and might not, though using reasonable diligence, be able to ascertain, the danger to which the bad condition of the track exposed him.

APPEAL from an order of the District Court, Waseca county, denying motion to vacate verdict and give new trial.

Lovely & Morgan, for respondent.

J. D. Springer, Colleston Bros., and *Lewis & Leslie*, for appellant.

GILFILLAN, C. J.—Action for personal injuries sustained by plaintiff by the running off from defendant's track of a box car, on which he was in its service as a brakeman. That the track was bad defendant does not deny. Indeed, it appears to have endeavored at the trial to show the track in worse condition than as shown by the evidence on the part of the plaintiff; its theory as presented here, and apparently as presented in the court below, being that the condition of the track was so bad that the plaintiff must have known the danger to which he was exposed by continuing in the employment. That the injury was caused by the unsafe condition of the track was shown clearly enough. It is not claimed that defendant ever gave plaintiff actual notice of its unsafe condition; nor is it claimed that it had used proper care to have the track safe, except that, having allowed it to fall into bad condition, the defendant was then engaged in extensively repairing and putting the track in safe condition by resurfacing the bed and taking up the old ties and rails and replacing them with new ties and new steel rails. A gravel train on which plaintiff served as brakeman was loaded with gravel at a gravel-pit about four miles south of Waseca, and was drawn south to a point near New Richland, about seventeen miles from the gravel-pit, and there the gravel was unloaded by the side of the track wherever needed for the purpose of resurfacing, and then the train would return to the pit to be reloaded. When the train would return to the pit at night the gravel cars were left there, and the locomotive, with a box car on which plaintiff served as brakeman, brought the workmen into Waseca for the night. It was while thus coming from the pit to Waseca for the night that the casualty occurred.

We will not attempt to set forth the language of the court below in its instructions to the jury. The propositions touching the rights and duties of the parties contained in it are, in substance, these: *First*, the plaintiff, by continuing in the employment assumed the reasonable ordinary risks of the occupation upon which he entered—that of brakeman upon a gravel train repairing the road of the defendant—and if his injuries resulted from such risk he cannot recover; *second*, that it was the duty of the defendant to furnish plaintiff in his employment a reasonably safe and suitable road over which to travel; *third*, but that if he knew or had competent opportunity to learn the defects and imperfections in the track and the negligence on the part of the defendant, and still continued in the employment, he cannot recover.

On the first and third of these propositions no point is made; but upon the portions of the charge containing the second the de-

fendant (having saved the objection by its first, second, and sixth exceptions to the general charge, and its exception to plaintiff's first request) makes the principal question in the case. The objection made to it is that the rule which it states is not applicable. That it is the duty of a master to use reasonable care and skill to furnish his servants safe and suitable instruments and means to perform the service in which they are employed, is not denied by the defendant. But it is claimed that it does not apply to the safety or condition of a thing which the servant is employed to repair. It is argued in effect that where servants are employed to put a thing in safe condition and good repair it would be inconsistent and absurd to require of the master to have it in safe condition and good repair for the purpose of such employment, and where the servant has nothing to do with the thing but to repair it the argument is undeniable. Such, however, is not exactly this case. The defendant was making extensive repairs to its track, necessarily doing the repairs or renewals, a part at a time; or, rather, so far as plaintiff was concerned, it was preparing for such repairs by having the necessary material hauled and distributed along its track where it might be needed; and for this purpose it furnished, as one of the means to perform the service required of plaintiff, the old track, so far as it had not been taken up. Was it the duty of the defendant to plaintiff to have the old track it so used in a reasonably safe and suitable condition to perform this service? The duty of a master in respect to the instruments and means furnished his servant to perform his service is the same, whatever the nature of the service may be—whether it be to repair or to do any other thing. For instance, where repairing is to be done by means of engines and machinery, the duty of the master applies to such engines and machinery; or if the servant is required to remove damaged cars to the place and for the purpose of repairs, where he assumes the risk that necessarily arises from the damaged condition of the cars, it is the duty of the master to use the proper care and skill in respect to the track over which the cars are to be moved, and to the other instruments, means and appliances for moving them, and it extends also to the establishing and promulgating suitable and needful regulations for the safe and proper conduct of the business, having reference to its risks and exigencies. *Fraker v. St. Paul, M. & M. Ry. Co.*, 15 Am. & Eng. R. R. Cas. 256.

There is no difference as to the duty of the master and the assumption of risk by the servant between an employment to make repairs and any other employment. In all cases the servant is held to take on himself the risks necessarily incident to the employment, unless, perhaps, they be latent and known to the master, but not known to, nor by the use of proper diligence discoverable by, the servant; and in no case does he take on himself risks

that arise by reason of neglects on the part of the master, unless they be known to him, or by the use of proper diligence are discoverable by him. If the danger in making repairs is increased by the damaged condition of the thing to be repaired, he ordinarily assumes the risk of such enhanced danger; but if it be increased by the neglect of the master to use proper care to employ competent and careful fellow-servants, or to furnish safe and suitable means and instruments to perform the service, or to establish and promulgate suitable and needful regulations for the safe and proper conduct of the business, he does not ordinarily assume such risks. In this case the danger might be designated as a risk incident, not so much to the work of repairing the track as to the manner of doing it, or of the regulations for the conduct of the business. For it seems that defendant, using the old track for the purpose, chose to distribute the necessary material, the gravel, ties, and rails, on a long line of the road before doing the actual work of repairing; that is, of putting the new material into the track. That this was a more convenient and less expensive mode of doing the work than by delivering the material only so far as actually put into the repairs, commencing at one point and proceeding simultaneously with the delivery of the material and the actual renewal of the track, and using the new track for the purpose of delivering the material, is probably true. But it does not appear that it was necessary, nor that the work could not have been done in the way we have indicated.

The case, however, was not submitted to the jury on the theory that there might be danger to the employes arising from the regulations for doing the work, but on the theory that doing the work in that way it was the duty of the defendant to have the track which it required its servants to use in a reasonably safe and suitable condition for such use. In that, we think, the court below was right. The fact that the work in which plaintiff was employed was that of repairing or making preparations to repair the track did not diminish its duty to furnish safe and suitable means and instruments to do his work. As it required him in that work to use the old track it should have had it reasonably safe for the purpose.

This brings the case to the question of the plaintiff's knowledge, or opportunity to know, of the defects in the track which rendered it specially dangerous for him to continue in the employment. He knew that the track was rough; that the defendant had begun to repair it, to relay it with steel rails; that new ties had been distributed along it; and that his train was hauling gravel for the purpose of repairs. From these facts defendant insists that plaintiff had reasonable opportunity to know the defect in the track, so as to be charged with assuming the risk by continuing in the employment. On the other hand, however, there is some evidence

that, while attending to his duties as such, a brakeman might not become aware of the rottenness of the ties, and the insecure manner in which the rails were fastened to them (which the evidence points to as the defects causing the accident). Plaintiff denied knowing of the defects; and it appears, also, that besides the gravel train and extra trains, three passenger and four freight trains per day passed each way over the track, which plaintiff insists was a constant assurance on the part of the defendant that the track was in a reasonably safe condition for the use of the gravel train. On the whole, this was a question for the jury.

The proposition in defendant's second request was given to the jury in the general charge.

We see nothing in the other exceptions to the charge or requests. The exceptions are mainly verbal criticisms, not well founded when the charge is taken as a whole.

The question to the witnesses Ryan and White related to the appearance of the ties and fastenings, and whether their condition was, from such appearance, open to observation, and were proper for the purpose of showing to what extent the track was out of repair, and that such condition was easily discoverable. The questions to Jerome, Madden, Sr., and Mrs. Madden, excepted to, all related to plaintiff's appearance, actions and symptoms after the injury, as indicating a difference in his mental and physical condition. They called for and elicited only facts, and not opinions.

The objection made here to the questions to Dr. Cummings was not specifically pointed out in the objection made below, and therefore will not be considered here.

Order affirmed.

Brakeman not Presumed to be Acquainted with Defective Condition of Track.—Brakemen and other employes upon railroad trains having no special reason to acquaint themselves with the condition of the track are not required to know whether or not it is in safe condition. They will not therefore be taken to have assumed all risks of injury from such cause. *O'Donnell v. Allegheny V. R. R. Co.*, 59 Pa. St. 239; *Goheen v. Texas, etc., R. Co.*, 3 Cent. L. J. 382; *Meehan v. Syracuse, etc., R. Co.*, 73 N. Y. 585; *Porter v. Hannibal, etc., R. Co.*, 60 Mo. 160; *Chicago, etc., R. Co. v. Sweet*, 45 Ill. 197; *Harrison v. Central R. R. Co. of N. J.*, 81 M. J. L. 293; *Dale v. St. Louis, etc., R. Co.*, 63 Me. 455; *Porter v. Hannibal & St. Joe R. R. Co.*, 2 Am. & Eng. R. R. Cas. 44.

The above cases, it will be observed, apply only to the case of employes upon ordinary trains. As far as we have been able to discover there is no case in the books at all similar in facts to the principal case—where the employé was injured while on a construction or repairing train. We must permit ourselves to express considerable doubt as to the soundness of the decision.

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ever that may be, it is clear that by the whole instructions given to the jury by the court the issues were virtually, and we may say critically, stated, though not particularly stated as such. The law bearing upon every issue in the case was carefully given, and the jury were informed that, if they found the facts as alleged by plaintiff in error in its answer, without referring to it, they must find for the defendant, plaintiff in error. It is true that, as a matter of practice, it would be better for the trial court to state the issues by an instruction given for that particular purpose. Yet it is not always done; and in the absence of any effort on the part of the parties to have it done, we do not think a judgment should for that reason be reversed. It has been decided by this court, and we take it to be now settled in this State, that before the complaint that an instruction is not sufficiently explicit will be regarded, the matter must have been brought to the attention of the trial court by a request for a satisfactory instruction which was refused. *B. & M. R. R. Co. v. Schluntz*, 14 Neb. 425; s. c. 14 Am. & Eng. R. R. Cas. 182; *Sioux City R. Co. v. Brown*, 13 Neb. 317; s. c. 10 Am. & Eng. R. R. Cas. 406.

The next question presented is that "the instructions given to the jury at the request of the plaintiff had endorsed on the margin citations and references to authorities, stated in the presence of the jury to be in support of the instructions asked." Our attention has not been called to any part of the record which shows what was stated in the presence of the jury, nor that any objection was made thereto, and an adverse ruling made; but, passing that question, and giving the plaintiff in error the full benefit of it, we fail to see prejudicial error. Again we say that, as a matter of practice, we do not approve of such marginal references. They were evidently intended as a memorandum for the benefit of the court, and for no other purpose; so that, if the court should doubt the correctness of the law as stated in the instruction, he could turn to the authorities cited and verify their correctness. When that was accomplished, those references should, perhaps, have been obliterated. The *practice* ought not to be encouraged by the courts. But we fail to see the prejudice resulting to either party. It was argued that it might, and naturally would, have a tendency to more fully impress upon the minds of the jury the soundness of the law as stated in the instructions. How could it? It was the duty of the jury to accept the law as given by all the instructions as the law of the case, and that without question. The court is the sole judge of the law; the jury, of the facts. Again, what harm could possibly result from the statement in the presence of the jury that the authorities cited supported the instruction? The statement was evidently made to the court. If the authorities thus cited had been read to the court, and commented on, by way of argument, by the counsel presenting the

instructions, no objection could have been made thereto; and, in fact, this is a very common custom, approved by the courts and the bar in general. If this is allowable, we can see no reason why a reference to the authorities, under the same circumstances, may not be. Each instruction given by the court upon its own motion was excepted to by the plaintiff in error; but as some of them seem to us to be more in its favor than against it, we will not examine those which are, apparently, open to this criticism.

Instruction No. 2 is as follows: "Before plaintiff can recover you must be satisfied by a preponderance of evidence that the defendant owned and was operating the locomotive boiler and engine thereto attached at the time of the alleged explosion; that there was an explosion of said boiler by reason of negligence on the part of defendant; and that this plaintiff was damaged by reason of such explosion. Complaint is made of this instruction for the reason that "it practically told the jury that plaintiff could recover if the defendant was negligent, and left out of view the plaintiff's contributory negligence." Whatever objection of this kind might be urged against this instruction if taken alone, we are convinced that instruction No. 3, which follows the one complained of, and instruction No. 4 of those asked by the plaintiff in error (defendant below), and given by the court, would remove all objection. No. 3 is as follows: "Ordinarily, a plaintiff in an action of this character for damages cannot recover where he is guilty of contributory negligence, as contributory negligence may be of various degrees." What is meant by the latter clause of this instruction is explained in instruction No. 5. The fourth instruction above referred to is, as modified by the court, as follows: "If the jury find from the testimony that plaintiff, prior to the explosion of the boiler upon engine No. 2, had been the engineer in charge of said engine, and was such engineer at the time of said explosion; and if you further find that the said plaintiff knew of the defects in the throat-sheet of said engine, and with such knowledge continued in the employment of said defendant, and ran and operated said engine without objection, plaintiff cannot recover for any injury he may have sustained by reason of the explosion of the boiler of said engine." When we reflect that the only contributory negligence alleged against the defendant in error consisted in the fact that he continued to operate said engine after indications of the weakness of the iron was discovered by him, and the attention of the proper agents and servants of the plaintiff in error called to the fact, with the request by him that another engine be furnished him, it becomes quite clear that these instructions are, when taken together, unobjectionable.

The facts in this case may be briefly stated to be that the defendant in error had, for about two years, been in the employ of the plaintiff in error as a locomotive engineer on its railroad; that

he had charge of this particular engine for a considerable part of this time. Towards the latter part of this employment he noticed what he conceived to be evidence of weakness in that part of the locomotive known as the throat-sheet. He called the attention of the proper officers and agents of the plaintiff in error to this fact, and, upon examination, it was thought there was no immediate danger, and he was instructed to continue with the engine until such time, in the near future, as they could effect an exchange, and cause the necessary repairs to be made. Afterwards, seeing, as he thought, increasing signs of weakness in that part of the boiler, he again, and on several occasions, called attention to the facts, when he was informed that another engine would be furnished him in a given time, and requested to continue with the one in question until that time, which he did, and for two days longer, when the accident occurred. During this time he was careful to keep the steam at a comparatively low pressure, and supposed that, with this precaution, there was no immediate danger. It is not claimed, and cannot be, that the explosion was caused or brought about by any negligent act of his. Under these circumstances, it seems to us that the true rule might be stated to be that if the defective machinery, though dangerous, is not of such character that they may not be reasonably used by the exercise of care, skill and diligence, the servant does not assume the risk. The servant, in obedience to the requirement of the master, makes use of machinery which, though dangerous, is not so much so as to threaten immediate injury; or, where it is reasonably probable it may be safely used by extraordinary caution or skill, the master would be liable for a resulting accident. At least, such a rule is as favorable to the plaintiff in error as could, in our opinion, be reasonably required by it; and especially would this be true when it is shown that the master was fully informed of the apparent danger, and the machinery used upon his request and judgment. *Snow v. Housatonic R. Co.*, 8 Allen, 441; *Colorado, etc., R. Co. v. Ogden*, 3 Colo. 499; *Patterson v. Pittsburgh, etc., R. Co.*, 76 Pa. St. 389; 2 *Thomp. Neg.* 967; *Keegan v. Western R. Corp.*, 8 N. Y. 175. Applying this rule to the instructions, we think they correctly state the law.

Complaint is made of instruction No. 2, asked by the defendant in error and given by the court. This instruction is as follows: "If the engine furnished by the defendant for the use of the plaintiff in its service had been in service as long as it could with safety be used without examination and overhauling, and defects existed in the boiler which could have been ascertained by the exercise of reasonable and ordinary care and prudence, it was the duty of the defendant to have ascertained and remedied such defects, instead of suffering the plaintiff to be exposed to the perils of an explosion; and if the defendant failed to perform such duty, it is

liable to the plaintiff for the damages which are the direct result of such failure, unless the plaintiff contributed thereto by negligence on his part." The objection to this instruction is in reference to the words "instead of suffering the plaintiff to be exposed to the peril of an explosion," which are found in the body of the instruction. It is quite difficult for us to see the functions of those words—why they were placed there, or what good purpose they can accomplish. It is equally as difficult for us to see what harm they can possibly do. Plaintiff contends they are "argument," and "could have no other effect than to arouse the feelings of the jury and enhance the amount of their verdict without any just cause for it." While we can see no particular necessity for the language, as the instruction without it has the same meaning and purport, yet we fail to see anything more in that language than a conclusion, or, rather, a comparison which naturally irresistibly arises in the mind from the instruction as it would be without it. If the plaintiff in error had ascertained "and remedied the defect," instead of doing as it did, it would not have been liable. But failing to do so "unless the plaintiff (defendant in error) contributed thereto by negligence on his part," the plaintiff in error would be liable. The error is not prejudicial, and the judgment will not for that reason be reversed.

The third instruction asked by defendant in error, and given by the court, is as follows: "Even if the agents of the defendant, who had charge of the engines on defendant's road and the duty of their repair, did not positively know that the engine was unsafe, yet, if it was, in fact, unsafe, and they had received such reports in regard to it as ought to have put them on their guard, and to have led by the use of proper diligence to knowledge of the facts, the defendant must be held to the same liability as if their agents had actual knowledge." The complaint as to this instruction is that "it holds the defendant liable, regardless of who of its agents had knowledge of defects of the engine, or to whom reports of such defects were made." This position cannot be maintained. The instruction is intended to apply to the testimony introduced on the trial. The defendant in error claimed that the proper officers and agents had knowledge of the defects of the engine. That *knowledge* was denied by some of them, but the proof showed that the engine had been reported to them as unsafe. If they could have ascertained as to the truth of those reports, made to them directly by those whose duty it was to make such reports, it was their duty to do so. If they declined or refused to know the facts which, by "proper diligence," would have led to an absolute knowledge of those facts, the liability would be the same as if they knew. As to what agents are referred to by this instruction was clearly set forth by the instructions, as well as by the whole case. It is insisted by the plaintiff in error that

the testimony of certain witnesses, whose occupation was that of boiler-makers, was improperly received, as, by their own testimony, they were incompetent to testify as experts. They all showed that, for a long time, they had been engaged in making boilers, and some of them showed experience in testing boilers. They testified to their knowledge and experience as to the matters inquired of. Their testimony was clearly competent. The amount of *weight* to which their testimony was entitled was a question for the jury to determine. Courts cannot establish a standard by which to measure expert witnesses. If they show that they have practical skill, or scientific knowledge and experience, as to the matters under investigation, they are competent to testify. The deposition of the witness De Haven was taken by the plaintiff in error, but read to the jury by defendant in error. Objection was made to the reading of a part of his answer to one of its interrogatories, for the reason that the same was not responsive to the interrogatory; but, as the objection was not made and filed before the commencement of the trial, as required by Sec. 390 of the Civil Code, the court was justified in disregarding it. See also, Weeks, Dep. Sec. 404. .

The next objection urged by the plaintiff in error is to the admission in evidence of a selection from a book entitled "A Catechism of a Locomotive," by "Forney." Section 342 of the Civil Code provides that "historical works, books of science or art, and published maps or charts, when made by persons indifferent between the parties, are presumptive evidence of facts of general notoriety or interest." This book was sufficiently shown by the testimony of the witness Tell—who was one of the expert witnesses of plaintiff in error—to be a standard work to admit it in evidence. While it is perhaps true that evidence of that character was required before the book could be admissible, yet, the testimony offered being uncontradicted, there was enough, *prima facie*, to admit it. Much is said by counsel on both sides upon the subject of "comparative negligence" and the relative degrees of care and diligence exercised by the parties to the action. We have failed to find any proof of negligence on the part of defendant in error, and will dismiss that subject without further remark.

The record shows that after the defendant in error had introduced all his testimony on the trial, and had rested his case, the "defendant (plaintiff in error) moved the court to direct the plaintiff to allow the physicians, called on the part of the defense, to make an examination of his person with reference to his alleged injuries for which he now seeks to recover. The court ruled that it had no power to make such an order; to which ruling defendant excepts." Error is assigned in this court based upon this record. If such examination was proper to be made, and if the defendant in error, upon application, had refused to allow it to be done, we

are inclined to believe the court had the *power* to make and enforce such an order. It is fundamental that, if a decision or ruling of a court is correct, the fact that the reason assigned therefor by the court, when making it, is not sufficient to sustain the order; the fact of such deficient reason being given will not vitiate the ruling or order. The question now before us is, did the court err in its refusal to make the order requested? We think not. It is not the province of courts to make useless and unnecessary orders simply because they are so requested. There was no showing made to the court that permission to make the examination had been refused by defendant in error, nor that any such permission had been requested. There is no showing of any kind that such examination was necessary in order to aid the defendant in error in making its defense; indeed, there was no intimation made that any good could possibly result or benefit be derived from such an examination. The request was made in the midst of the trial. The court was asked to stop the trial and send out the plaintiff in the suit for examination. Again, this request hardly possessed all the elements of fairness. The court was asked to virtually place the defendant in error in the hands of the defense. It was not sought to have the examination made by disinterested and unbiased surgeons whom the parties might select or the court appoint, but by the "physicians called upon the part of the defense." Again, the record shows that, when the witnesses on the part of the defense were placed upon the stand to testify upon the question of the alleged injury, the defendant in error was asked to "step forward and allow the witness to examine him," which he did.

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The record further shows that the defendant in error was "asked to remove his coat and vest, which he does, and the witness examines the back, sides, and other portions of the body of the plaintiff; also as to his breathing; also the condition of his eyes, the muscles of the leg, the condition of the tongue and of the pulse." From this it would seem that even if the court had erred by its refusal to make the order, that error was cured by the examination made by consent of defendant in error. The only case cited by plaintiff in error in support of his position is *Schroeder v. C., R. I. & P. R. Co.*, 47 Iowa, 375. But there is a wide distinction between that case and this. In that case the request was made after the jury was impaneled, but before any of the testimony was heard. The application was in writing, and requested the examination to be made by a "proper number of physicians to be selected, in equal numbers, by plaintiff and defendant, and it was proposed by defendant that its own medical officer

should not be one of the number; * * * and in support of this application the affidavit of a surgeon and physician in the employment of defendant was filed, stating that he had professionally attended plaintiff immediately after he was injured, and had made personal observation of plaintiff's condition, and had heard his testimony at the former trial, and it was his belief, based upon these means of knowledge, that his injuries were not of the character claimed by him, and that the truth of the matter could be ascertained by a proper personal examination of plaintiff." It also appears in that case that an effort was made to procure an examination of plaintiff in the presence of the jury, as was done in this case, but the plaintiff refused to submit to it and the court would not order it; and that, too, after the plaintiff had testified that his back and internal organs were affected by the injury, and "that one of his legs was disabled to an extent that deprived him of its full use, and that he thought it appeared to be smaller and somewhat shrunken." Our attention has been called to no other case upon the subject, and we know of no other holding as the Iowa case. As to the soundness of the position taken by that court we have nothing to say. The question is not before us. It is enough to say that under the authority of that case it cannot be made to appear that the ruling of the court in this case was erroneous, or that it abused its discretion in refusing to make the order sought.

The next question presented by plaintiff in error is that the verdict of the jury is not sustained by sufficient evidence. With the exception hereafter noticed we cannot agree with the counsel for plaintiff in error. We have already in some degree discussed the evidence and facts of the case, and the length of the record must prevent any further discussion thereof. We have carefully examined the record and conclude the evidence will sustain a verdict for defendant in error. The last matter presented for consideration is that the verdict is excessive. To this proposition we assent. The testimony shows that at the time he received the injury the defendant in error was about twenty-five years of age. While the testimony of the physicians leave it in doubt as to his final and complete recovery, it appears that at the time of the trial he had so far recovered from his injury as to be engaged in business, and to be able to devote most of his time thereto. The injury is defined and described by the physicians as concussion of the spinal cord, by which a diseased or abnormal condition of the nervous system is produced, affecting his general health to some extent and depriving him of the ability to engage in active physical labor, and perhaps rendering him unfit to engage in his business as railroad engineer. He has retained his mental faculties to their full extent. At times he is free from pain; at others he has a soreness and pain in his back. There was no laceration of

any part of his body, no fracture of any bones. There is supposed to be no injury to the bones of his spinal column. The physical or visible evidences have disappeared, and some of the physicians give it as their opinion that there will ultimately be a substantial but perhaps not a complete recovery.

Believing that the verdict is excessive, the judgment and decision of this court is that the judgment of the district court is set aside and a new trial granted, unless the defendant in error enter a *remittitur* of the sum of \$3,000 within thirty days from this date. If such *remittitur* is filed, the judgment to the extent of \$6,250 will be affirmed.

Judgment accordingly.

Duty of Railroad Company to Servants as to Safe Track and Machinery.—A railroad company is bound to exercise reasonable care to furnish to its employes a safe track and machinery and to keep the same in repair. *Wright v. New York Central R. R. Co.*, 25 N. Y. 562; *Hough v. Texas Pacific R. R. Co.*, 100 U. S. 213; *Toledo, etc., R. R. Co. v. Asbury*, 84 Ill. 429; *Muldowney v. Iowa Central R. R. Co.*, 39 Iowa, 615; *Botsford v. Michigan, etc., R. R. Co.*, 38 Mich. 256; *Palmer v. Erie R. Co.*, 34 N. J. L. 151; *Fifield v. Northern R. Co.*, 42 N. J. L. 225; *Mullen v. Philadelphia, etc., R. Co.*, 78 Pa. St. 25; *Nashville, etc., R. R. Co. v. Jones*, 9 Heisk. 27; *Brabito v. Chicago, etc., R. R. Co.*, 38 Wis. 239; *Chicago & Alton R. R. Co. v. Platt*, 89 Ill. 141; *Cagney v. Hannibal & St. Joe R. Co.*, 69 Mo. 416; *Fuller v. Jewett*, 1 Am. & Eng. R. R. Cas. 109; *Porter v. Hannibal & St. Joe R. Co.*, 2 Am. & Eng. R. R. Cas. 44; *Cone v. Delaware, L. & W. R. Co.*, 2 Am. & Eng. R. R. Cas. 57; *Holden v. Fitchburg R. Co.*, 2 Am. & Eng. R. R. Cas. 94; *Gates v. South Minnesota R. R. Co.*, 2 Am. & Eng. R. R. Cas. 237; *Kain v. Smith*, 2 Am. & Eng. R. R. Cas. 545; *Galveston, H. & S. A. R. Co. v. Delahanty*, 4 Am. & Eng. R. R. Cas. 628; *Little Rock, etc., R. Co. v. Duffey*, 4 Am. & Eng. R. R. Cas. 637; *Palmer v. Denver, etc., R. Co.*, 6 Am. & Eng. R. R. Cas. 615; *Totten v. Pennsylvania R. R. Co.*, 6 Am. & Eng. R. R. Cas. 616; *Painter v. Northern Central R. Co.*, 5 Am. & Eng. R. R. Cas. 454; *Lake Shore, etc., R. Co. v. McCormick*, 5 Am. & Eng. R. R. Cas. 474; *Pittsburgh, etc., R. Co. v. Sentmeyer*, 5 Am. & Eng. R. R. Cas. 505; *Herbert v. Northern Pac. R. Co.*, 8 Am. & Eng. R. R. Cas. 85; *Louisville & N. R. Co. v. Orr*, 8 Am. & Eng. R. R. Cas. 94; *Umback v. Lake Shore & M. S. R. Co.*, 8 Am. & Eng. R. R. Cas. 98; *Baker v. Allegheny Valley R. Co.*, 8 Am. & Eng. R. R. Cas. 141; *Missouri Pacific R. Co. v. Lyde*, 11 Am. & Eng. R. R. Cas. 188; *Fay v. Minneapolis & St. L. R. Co.*, 11 Am. & Eng. R. R. Cas. 193; *Atchison, T. & S. F. R. Co. v. Holt*, 11 Am. & Eng. R. R. Cas. 206; *Chicago & E. Ill. R. Co. v. Rung*, 11 Am. & Eng. R. R. Cas. 218; *Lake Erie & W. R. Co. v. Everett*, 11 Am. & Eng. R. R. Cas. 221; *East Tenn., Va. & Ga. R. Co. v. Toppins*, 11 Am. & Eng. R. R. Cas. 222; *Atchison, T. & S. F. R. Co. v. Moore*, 11 Am. & Eng. R. R. Cas. 243; *Wilson v. Denver, S. P. & P. R. Co.*, 15 Am. & Eng. R. R. Cas. 192; *Solomon R. R. Co. v. Jones*, 15 Am. & Eng. R. R. Cas. 201; *Guthrie v. Louisville & N. R. Co.*, 15 Am. & Eng. R. R. Cas. 209; *Leahy v. Southern Pacific R. Co.*, 15 Am. & Eng. R. R. Cas. 230; *Richmond & D. R. Co. v. Moore's Adm'r*, 15 Am. & Eng. R. R. Cas. 239; *Brown v. Atchison, T. & S. F. R. Co.*, 15 Am. & Eng. R. R. Cas. 271; *Louisville, etc., R. Co. v. McCoy*, 15 Am. & Eng. R. R. Cas. 277.

Submission of Person to Inspection of Experts.—Where it is necessary to further the interests of justice a party suing a railroad company for personal injuries may be compelled to submit his person to the examination of competent medical experts. *Walsh v. Sayre*, 52 How. Pr. 334; *Schroeder v. Chicago, R. I. & P. R. Co.*, 47 Iowa, 875; *Atchison, T. & S. F. R. Co. v. Thul*, 10 Am. & Eng. R. R. Cas. 783, and note referring to cognate authorities.

Where it does not appear that such an order is necessary for purposes of justice, it will not be made. *Lloyd v. Hannibal & St. Joe R. R. Co.*, 53 Mo. 509; *Sioux City & P. R. Co. v. Finlayson*, *supra*.

See *Muchado v. Brooklyn City R. Co.*, 80 N. Y. 370, in which it was decided that a party might exhibit an injured limb to the jury so that a surgeon could demonstrate the nature and character of the injury.

CLARK'S ADMINISTRATOR

v.

RICHMOND & DANVILLE R. R. CO.

(*Advance Case, Virginia, March 13, 1884.*)

The rule is to allow either party to demur to the evidence, and the court may compel a joinder in demurrer unless the case be clearly against the party offering the demurrer, or the court is in doubt what facts should be reasonably inferred from the evidence demurred to.

By a demurrer to evidence the demurrant must be considered as admitting all that could be reasonably inferred by a jury from the evidence of his adversary, and as waiving all his own evidence which contradicts that of his adversary, or the credit of which is impeached, and all inferences from his own evidence which do not necessarily flow from it.

C., a brakeman on a freight train of the R. & D. R. R., while in the discharge of his duties on the top of a car, on the night of the 21st of February, 1880, was struck by an over-head bridge and killed. This bridge, like most of the over-head structures on same road, did not admit of a man's standing erect upon the top of a car while passing under it. Previous to his employment as brakeman, C. had been employed in the railroad company's yard in shifting cars, making up trains, etc. At the time of his employment as brakeman he was warned by the company's agent to look out for the over-head bridges, and his fellow brakemen were instructed to show him the bridges and warn him of the danger of them. He had passed under this same bridge three times in daylight. On the night of which he was killed, on leaving the station next before the bridge, he was warned to "look out for the bridge," and upon approaching the bridge his fellow brakeman, observing that he was standing, shouted to him to stoop, but he did not do so. In an action for damages brought by C.'s administrator the defendant demurred to the evidence. *Held*:

1. C. was guilty of negligence which was the proximate cause of his death, and the company is not liable in damages therefor.

2. The risk being one incident to the employment, and arising from causes open and obvious, the dangerous character of which C. had the opportunity to ascertain, must be held to have been in contemplation at the time of the contract, and to have been assumed by C. For this reason also the company is not liable.

ERROR to the Circuit Court of Danville.

Trespass on the case by H. F. Clark, administrator of James H. Clark, deceased, against the Richmond & Danville Railroad, to recover damages for the killing of the said James H. Clark, a brakeman on the said road, through the alleged negligence of the defendant. Demurrer to evidence by the defendant, joinder therein and judgment for the defendant. The plaintiff obtained this writ.

The facts are fully stated in the opinion.

Flournoy & Martin, and *Carrigan & Fitzhugh*, for the plaintiff in error.

H. H. Marshall, for the defendant in error.

LACY, J.—The case is as follows: The deceased, James H. Clark, was a brakeman upon a freight train of the defendant company; he lost his life on the 21st day of February, 1880, while in discharge of his duties as brakeman, and his administrator, the plaintiff in error, brought this suit to recover of the defendant in error damages, on the ground that his death was due to the negligence of the defendant in error. The defendant demurred to the evidence, and the court compelled the plaintiff to join therein; the jury assessed the damages of the plaintiff, if judgment should be for him, at \$7,500. The court sustained the demurrer, and gave judgment for the defendant thereon, whereupon the plaintiff applied for and obtained a writ of error and *supersedeas* to this court, which was awarded May 18, 1882.

The plaintiff's intestate's duty as brakeman on a freight train required him to be on top of the moving train. In his service upon the said freight train, while running from Greensboro to Richmond, he was struck by a highway bridge which spans a cut in the said railroad line on the suburbs of the city of Danville, and killed by the collision. In coming to Danville the train runs down grade, which begins about a mile before reaching the said highway bridge. It was impossible for a man of ordinary stature to stand erect on the freight cars and pass with safety under said bridge, and such is the case with most of the over-head structures on the line of this road.

It is insisted that the defendant company was guilty of negligence in constructing its over-head bridges so low as to require a brakeman who is doing duty to stoop in order to pass under the same with safety; and that it was negligence in the said company not to have any ascertained and established system of bridge signals to give notice of the approach to these bridges, and not to have any guard across the track to warn its employes of the approaching danger; and that in this case there was no sufficient warning given this brakeman, who was a new hand and under twenty-one years of age, of the approach to this particular bridge which was passed in the night time. The evidence shows that the said employé was of the usual size and stature of full-grown men, being six feet high, and weighing 180 pounds, and having the appearance of a full-grown man; and the fact that he was under age was unknown to the company, or to any one of its agents; that the said employé had been employed by the said company some two years before without objection on the part of his father, who suffered his son to collect his own pay from the company, and pay it

to him ; that for some time before he sought and obtained employment as brakeman he had been employed in the company's yard in Manchester, shifting cars, making up trains, and the like. The evidence shows that at the time when his service was engaged by the company's agent, the said employé was warned to look out for the over-head bridges, and his fellow brakemen were instructed to show him the bridges and warn him of the dangers attending the same. The said employé had been under this highway bridge three times, and in the day time, and was killed in going under the same in the night time, but it was not a dark but a moonlight night ; that on leaving the station west of Danville his fellow brakeman had said to him, " Now we are going down to Danville ; look out for the bridge," and the bridge in question was the only bridge in going from there down to Danville. When nearing the bridge his fellow brakeman saw he was standing, endeavored to warn him of the danger, and shouted to him to stoop, but he remained standing as if not hearing or noticing, and was struck and killed by the bridge.

The principles upon which a demurrer to evidence is to be considered have been often stated by this court. Upon the demurrer to evidence the practice is to allow either party to demur, unless the case be clearly against the party offering the demurrer, or the court should doubt what facts should be reasonably inferred from the evidence demurred to, in which case the jury is the fit tribunal to decide ; to put all the evidence offered on both sides into the demurrer, and then to consider the demurrer as if the demurrant had admitted all that could reasonably be inferred by the jury from the evidence given by the other party and waived all the evidence on his part which contradicts that offered by the other party, or the credit of which is impeached, and all inferences from his own evidence which do not necessarily flow from it. See the opinion of Standard, Judge, in *Ware v. Stephenson*, 10 Leigh, 155 ; *Trout v. The Va. & Tenn. R. R. Co.*, 23 Gratt. 619 ; *Tutt v. Slaughter's Adm'r*, 5 Gratt. 364 ; *Green v. Judith*, 5 Rand. 1 ; *Hansborough's Ex'or v. Thorn*, 3 Leigh, 147 ; *Stevens v. White*, 2 Wash. 203, 210 ; *Union Steamship Company v. Nottingham*, 17 Gratt. 115 ; *Richmond & Danville R. R. Co. v. Morris*, and *The same v. Anderson*, 30 Gratt. 200 and 812 ; *Richmond & Danville R. R. Co. v. Moore*, 15 Am. & Eng. R. R. Cas. 237.

The plaintiff in error assigns as error in this case that he was compelled in the circuit court to join in the demurrer. Either party, plaintiff or defendant, has a right to demur to the evidence, and the other party will be compelled to join in the demurrer, *unless the case be plainly against the demurrant*, and his object in demurring seems to be clearly *nothing else but delay*. *Trout v. The Va. & Tenn. R. R. Co.*, 23 Gratt. 619 ; *Boyd's Adm'r v. City Savings Bank*, 15 Gratt. 636 ; *Hyers v. Green*, 2 Cal. 556 ;

Rohr v. Davis, 9 Leigh, 30; *Eubank's Ex'or v. Smith*, Va. Law Journal, 1883, 245. Upon the evidence in this case it cannot be said that the evidence was plainly against the demurrant, or that the object of the demurrant was clearly nothing else but delay, and the plaintiff was properly required to join therein. When we consider this evidence in the light of the authorities cited and the established principles which govern in the case of a demurrer to evidence, we must determine first whether the defendant was guilty of such negligence as was the immediate cause of the injury received by the deceased, and whether there was contributory negligence on the part of the deceased; whether the damage was occasioned entirely by the negligence or improper conduct of the defendant, or whether the plaintiff himself so far contributed to the misfortune by his own negligence or want of ordinary or common care and caution, that but for such negligence or want of ordinary care or caution on his part the misfortune would not have happened. In the first case, the plaintiff would be entitled to recover; in the latter not; as but for his own fault the misfortune would not have happened. Mere negligence or want of ordinary care or caution would not, however, disentitle him to recover unless it were such that but for that negligence or want of ordinary care and caution the misfortune could not have happened, nor if the defendant might, by exercise of care on his part have avoided the consequence of the neglect or carelessness of the plaintiff. The negligence charged against the defendant company is as we have seen that the over-head bridges are constructed so low as not to allow a person to stand erect upon the top of freight cars passing thereunder, and in the second place not sufficiently warning the deceased of the threatened danger.

In the case of *Devitt v. Pacific Railroad*, 50 Mo. Rep. 302, questions similar to these raised by this record were considered and decided by the court. The plaintiff's son was a minor and was killed riding on the top of a freight car passing under a bridge. The accident occurred in the day time, and the deceased had been in the employ of the company about three weeks, had frequently passed under the bridge, and had been repeatedly warned to look out for this and other bridges, and when last seen he was sitting upon the brake facing the bridge. The court in that case held that "it would be difficult to imagine a clearer case of contributory negligence, and if one guilty of it could recover, or his friends for him, if the experiment proved fatal, we must necessarily ignore the legal consequences of such negligence. * * *

An employé or servant cannot recover for injuries received from the negligence of other servants when the principal is not at fault. But if the principal has been guilty of fault or negligence either in providing suitable machinery or in the employment or selection of suitable agents or servants, and injury arises in consequence, he

must respond in damages. This liability is, however, modified when the servant himself, well knowing the default of his principal, as in providing defective or unsuitable machinery, voluntarily enters upon the employment. By so doing he assumes the risk, and hence cannot charge it to his employer. * * * If persons are induced to engage, in ignorance of such neglect, and are injured in consequence, they should be entitled to compensation; but if advised of it they assume the risk. They contract with reference to things as they are known to be, and no contract is violated and no wrong is done if they suffer from a neglect whose risk they assumed." Citing *Wright v. N. Y. C. R. R.*, 25 N. Y. 566; *Buzzel v. Laconia M. Co.*, 48 Me. 113; *Thayer v. St. L. & T. H. R. R.*, 22 Ind. 26; *Hayden v. Smithville M. Co.*, 2 Conn. 548; *Mad. R. & L. E. R. R. v. Barber*, 5 Ohio State, 541.

In the case of *Owen v. The New York Central Railroad Company*, 1 Lansing R. 108, a brakeman, in the employ of a railroad company, while discharging duties in the line of his employment upon the roof of a freight car, was carried against a highway bridge, and sustained injuries, for which he brought an action against his employer. The bridge was some three and a half feet higher than the top of the highest freight car in use by the company. The brakeman had entered into the employment of the company with knowledge of the position and height of the bridge, and he had had opportunity of informing himself as to its continuance in the same position. It was held that the plaintiff should have been non-suited, the danger from the bridge being clearly incident to the labor he undertook to perform. In view of the brakeman's knowledge as to the bridge, his omission to avoid the accident by stooping was such want of ordinary care and caution as would have defeated his action if otherwise maintainable. Having assumed the risk of injury to his person from the bridge, evidence offered by him upon the trial tending to show its dangerous character, was properly excluded. "The danger was open and obvious and within the plaintiff's personal knowledge at the time he entered the defendant's employment. It was a danger clearly incident to the service he undertook to perform. He knew as well as his employer the perils of the business, at least as respects the bridge in question, and the law will imply that he assumed the risk of personal injury." Citing *Sherman v. The Rochester & Syracuse R. R. Co.*, 17 N. Y. 153; *Faulkner v. The Erie R. R. Co.*, 49 Barb. 324, 39 N. Y. 468.

"This is a well-settled rule; but if the rule were otherwise, upon the evidence in this case, the plaintiff was not entitled to recover upon another ground. The injury was caused by his own negligence. It is admitted that he knew that this was a low bridge, and he must have known that he could not pass under it

while on the top of the cars, unless he stooped, without injury. He might have avoided all injury by the exercise of the most ordinary care and caution. The exception taken to the ruling of the court, excluding the evidence offered by the plaintiff that other persons had been killed at the same crossing, must be overruled. That evidence was wholly immaterial if the plaintiff took upon himself the risk of injury to his person from that structure, as he undoubtedly did."

In the case of the Baltimore & Ohio R. R. Co. v. Stricker, 51 Md. 47, the court said upon this question: "This suit was brought by the appellee to recover for injuries received by being carried against a bridge spanning the appellants' road while he was on the top of a 'house car' in the discharge of his duty as a conductor of a freight train. * * * To entitle the plaintiff to maintain this suit, it was necessary to prove that the company had been guilty of negligence which directly caused the injury; that is to say, that in the relation which existed between the appellee and the company, the latter had failed or neglected to perform some duty toward the appellee, which was devolved upon it by law. And, secondly, it must appear that the appellee was not guilty of any negligence on his part, or any want of reasonable prudence and caution to avoid the accident. First. As to the alleged negligence on the part of the company. In what did this consist? It was said it was negligent in constructing the bridge so low that a conductor or brakeman could not pass under it in safety on the top of a house car where his duty required him sometimes to be. But there is no evidence to support this position; on the contrary, all the proof shows that the employes of the company, and the appellee among them, every day passed under the bridge safely by observing the simple and easy precaution of stooping or sitting down while passing under the bridge.

"No negligence can be imputed to the company because the struts of the bridge were not high enough to allow a person to pass under them standing upright on top of the cars. Baylor v. Del. & W. R. R. Co., 11 Vroom. 23. It was not required of the appellee to stand upon his feet while passing the bridge. * * * Nothing is better settled than that the implied contract between the employer and the employé is that the latter takes upon himself all the natural risks and perils incident to the service. Moran's case, 44 Md. 292.

"When a servant enters upon an employment he accepts the service subject to the risks incidental to it. An employé who contracts for the performance of hazardous duties assumes such risks as are incident to their discharge from causes open and obvious, the dangerous character of which causes he had opportunity to ascertain. * * *

"If a man chooses to accept employment, or continue in it, with

the knowledge of the danger, he must abide the consequences so far as any claim against the employer is concerned. *Woolley v. M. D. Railway Co.*, 2 L. R. (Ex. Div.) 389.

"What then was the legal duty of this company? It was the duty of the company to exercise all reasonable care to provide and maintain safe, sound and suitable machinery, road-way, structures and instrumentalities; and it must not expose its employes to risks beyond those which are incident to the employment and were in contemplation at the time of the contract of service; and the employé has a right to presume that the company has discharged these duties. *O'Connell's case*, 20 Md., 312; *Scally's case*, 27 Md. 589; *Wonder's case*, 32 Md. 419."

In the case in hand the deceased, after service in the company's depot grounds for some time, engaged about shifting cars, coupling cars, and such like duties, sought employment as brakeman. As this service was performed in the town of Manchester, on the banks of the James River, which is spanned by one of the bridges of this railroad company, and close to the same, it might be presumed perhaps that he knew of the character of the duties of a brakeman performed before his eyes every day. But in this case it is clearly proved that he was instructed by his employer, at the time of the contract of service, as to the dangerous character of the service required of a brakeman, and especially as to the danger in passing under these over-head structures, without sitting down or stooping, and that he was notified in particular about this particular bridge, and that it was shown to him, and that he passed under it in the broad daylight, which he could not have done without stooping. That after passing under this bridge three times, he was specially warned about it again as he was about to pass under it on the fatal night. That he did not exercise the precaution required of stooping, and that he was standing up when he was struck. Why he did not stoop or sit down will never be known, as he was killed by the collision. Whether he forgot to stoop, as he had before done in passing under this bridge is not known, but his negligence in not exercising this simple and ordinary care and caution was the proximate cause of his death, without which it would not have occurred, and the appellant cannot recover damages therefor of the company. While we think the accident was caused by want of reasonable care on the part of the appellant's intestate, we do not rest our decision solely on this ground. This peril was one incident to the employment in contemplation at the time of the contract, and arising from causes open and obvious, the dangerous character of which the deceased had an opportunity to ascertain, and the risk of which he assumed. Having stated our opinion upon the rules of law applicable to the case, which deny to the appellee the right to recover, it is not necessary to more specially notice the several assignments of error contained in

the record. We are of opinion that there is no error in the judgment complained of and appealed from in this case, and the same must be affirmed.

Judgment affirmed.

Injuries to Brakemen from Low Bridges.—Where a brakeman, knowing that the bridges across the track are too low to permit a man to stand upright on the top of freight cars without being struck, remains in the service of the company, the risk run by him in regard to such bridges will be considered a risk of his employment, and in case of injury he cannot recover. *Baltimore & Ohio R. R. Co. v. Stricker*, 51 Md. 47; *Rains v. St. Louis I. Mt. & S. R. Co.*, 71 Mo. 164; s. c. 5 Am. & Eng. R. R. Cas. 610; *Baylor v. Delaware, L. & W. R. Co.*, 40 N. J. L. 23; *Wells v. Burlington, C. R. & N. R. Co.*, 58 Iowa, 520; s. c. 2 Am. & Eng. R. R. Cas. 248; *Wabash R. Co. v. Elliott*, 98 Ill. 481; s. c. 4 Am. & Eng. R. R. Cas. 651; *Pittsburgh & C. R. R. Co. v. Sentmeyer*, 92 Pa. St. 276; s. c. 5 Am. & Eng. R. R. Cas. 508; *Devitt v. Pacific R. Co.*, 50 Mo. 302; *Owen v. New York Central R. Co.*, 1 Laws (N. Y.) 108.

See *Riley v. Connecticut River R. Co.*, 135 Mass. 292; s. c. 15 Am. & Eng. R. R. Cas. 181, in which latter case it is held that the plaintiff cannot recover where the evidence wholly fails to show that he was using due care at the time the accident occurred. And see *Gibson v. Midland R. Co.*, 15 Am. & Eng. R. R. Cas. 507.

KOONTZ

v.

CHICAGO, R. I. & P. RY. CO.

(*Advance Case, Iowa, December 5, 1884.*)

While the rule is that when employes are required to use appliances in the performance of their duties, such appliances must be kept in suitable repair and be reasonably sufficient for the purposes intended, a railroad company cannot be held liable for injury to a brakeman caused by falling through a bridge which was being repaired, while walking thereon in the discharge of his duty to ascertain the cause of the stoppage of a train, such bridge being sufficient to allow trains to pass over it with safety, and the company having no reason to anticipate that it would be necessary for the employes on its trains to go upon it while being so repaired.

APPEAL from Johnson Circuit Court.

John S. Koontz was in the employ of the defendant as a brakeman on a freight train, and fell from a bridge and was killed. The plaintiff is administrator of his estate, and seeks to recover damages caused by the death of the deceased. On motion, the court directed the jury to find for the defendant, which they did, and the plaintiff appeals.

C. S. Rank, S. M. Finch and S. H. Fairall, for appellant.

Boul & Jackson and T. S. Wright, for appellee.

SEEVERS, J.—A short distance west of Iowa City the defendant constructed a bridge which formed a portion of its track. At the time of the accident the defendant was engaged in repairing the bridge, or rather was at that time replacing the old with a new bridge. The old bridge or portions of it had been taken away, but trains continued to pass over it as previously, except that they were run at a less rate of speed. The accident occurred about 9 o'clock at night. The train was stopped on the bridge because the engineer supposed some of the cars were off the track, or one of the brakes was set. The deceased was riding in the cab with the engineer or fireman, and when the train stopped the fireman picked up a lantern and got down for the purpose of seeing what was the matter, and the deceased also did the same thing, but he did not have any lantern. When the deceased was next seen he was lying at the base of an abutment of the bridge, greatly injured, and because of such injuries he in a few days thereafter died. The deceased must have passed on the grade alongside of the cars for a short distance, and stepped off the abutment through an opening in the bridge. There is no evidence tending to show that trains usually stopped on the bridge, or where this one did, for any purpose which required an employé to get down from the train on the track or bridge. The plaintiff claims to be entitled to recover because the bridge was "in an unsafe and dangerous condition for the employés of the defendant, whose duty it was to go upon the same." There was evidence tending to show when there is anything the matter with the train which causes it to be stopped, that it is the duty of the brakeman to ascertain what the matter is, and in the performance of his duty he may get down on the track and walk alongside of the cars.

One material question discussed by counsel is whether the defendant was negligent in permitting the bridge to be in the condition it was. In determining this question it will be assumed that but for the repairs being made the accident would not have occurred,—that is, that the old bridge was so constructed with planks laid over the same that the deceased would not have fallen; but there was no evidence tending to show he had knowledge such was the case, or could possibly have so supposed. Bridges and railway tracks must be repaired, and in doing so ordinary care must be exercised. What probably will occur should be anticipated and guarded against. The bridge in question was sufficient for trains to pass over it in safety. For this purpose due care did not require that the bridge should be planked. If, however, it was necessary for employés to pass over the bridge in the performance of their duties, ordinary care would seem to require that barriers should be erected or other precautions against accident used; the rule being, as we understand, when employés are required to use appliances in the performance of their duties, that such appliances

should be kept in suitable repair and be reasonably sufficient for the purpose intended. Several authorities are cited in support of this proposition, and we do not understand the rule to be controverted by the counsel for the defendant. Their contention is that it could not be anticipated something would occur which would render it necessary to stop the train at the place it did, and that it would be necessary for an employé to pass along the track and over the bridge for the purpose of ascertaining what was the matter; and we think this is so. If this is not true, then every bridge must be planked or otherwise guarded, and barriers must be erected at every cattle-guard; for it is impossible to tell where it may become necessary or prudent for a train to be stopped, and an employé required, in the performance of his duty, to pass alongside of the train for some necessary purpose. There is no evidence tending to show that this bridge is an exception to those constructed at other places on the line of the road. Ordinarily, it is not expected that employés will be required to walk across bridges, and they are not ordinarily constructed so that this can be done with entire safety; at least, during the night time.

Ordinary care does not require that every possible contingency must be anticipated and guarded against, but only such as are likely to occur. That a railroad company should anticipate that a train may, for some necessary purpose, be stopped at a place other than the usual stopping-places, is possibly true; but at what place cannot be anticipated, and therefore they, in the exercise of ordinary diligence, are not required, as we have said, to plank every bridge or cattle-guard, and have the whole track so guarded as to prevent accident to employés. The hazardous nature of the business is such that accidents occur for which the company is not responsible; and this is one of them. In support of the foregoing views, analogous cases might be cited. The facts, however, in such cases not being like those in the present case, we are content to base our conclusion on principle.

It is said the court erred in not submitting the question of negligence to the jury, but as there is no dispute as to the facts above stated, we think it was for the court to determine such question as a matter of law.

Affirmed.

PULLMAN PALACE CAR COMPANY

v.

BLUHM.

(109 *Illinois Reports*, 20.)

In an action by a servant against his master to recover for an injury caused by the use of a defective derrick in raising lumber, the question as

to what was the cause of the injury, or the combination of causes producing the result, is one of fact, which by law it is not the duty of this court to consider. So, also, is the question whether the damages are excessive.

In case, for an injury by the breaking off of the plaintiff's arm, there is no error in admitting proof that the bones at the fracture had failed to unite, and had formed what is called a "false joint," as it is not a question of law for the court to determine whether this was the result of the breaking of the arm as a proximate cause, or the result of a new, independent factor. Such question can properly be tested only by hearing the evidence, and submitting the questions of fact to a jury, under appropriate instructions.

A plaintiff cannot hold the defendant responsible for an injury to himself caused even in part by his own fault in failing to use ordinary care or ordinary judgment, or for any injury not resulting from the fault of the defendant, but caused by some new intervening cause not incident to the injury caused by the defendant's wrongful act or omission of duty.

In a case where the plaintiff's arm has been broken from the negligent conduct of the defendant, and the plaintiff exercises ordinary care to keep the parts together, and uses ordinary care in the selection of surgeons and doctors, and nurses, if needed, and employs those of ordinary skill and care in their profession, and still, by some unskillful or negligent act of such surgeon, doctor or nurses, the bones fail to unite, thereby making a false joint, the defendant, if responsible for the breaking of the arm, will be liable in damages for the unfavorable result of the injury.

A party, when injured, is bound by law to use ordinary care to render the injury no greater than necessary. It is his duty to employ such surgeons and nurses as ordinary prudence in his situation may require, and to use ordinary judgment and care in doing so, and to select only such as are of at least ordinary skill and care in their profession. But the law does not make him an insurer in such case.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county.

This is an appeal from the judgment of the Appellate Court affirming a judgment against appellant for the sum of \$3,500, rendered in the Circuit Court in favor of appellee.

The action rests upon allegations by appellee, in his declaration, that being a laborer for appellant, using a defective derrick of appellant in elevating lumber to the upper part of a building of appellant, he was hurt by the falling of the lumber upon him, "maiming, bruising and battering him, and breaking and bruising his arm, and so disabling him that he has been unable to do manual labor from thence hitherto, and remains still in the same condition," and that the falling of the lumber was caused "by reason of the unskillful and defective workmanship of defendant" in constructing and erecting the derrick, and "without any fault" upon the part of plaintiff; and, in another count, that the injury was the result of "poor material" used in constructing the derrick, and of unskillful construction, and that he used reasonable care, and that the falling lumber broke his arm and shoulder, and otherwise maimed and injured him, and he remained so; and in the third and fourth counts, that the injury done to him was great and *permanent*. There is no allegation that the injury was caused

by the unskillful or negligent mode of using the derrick. The sole complaint against appellant is, that the derrick furnished for use was imperfect and unsafe.

The proofs tend to show that certain employés of the appellant constructed a derrick to be used in raising lumber and materials in the finishing of a house, to the top or upper parts of the house, and that while appellee and others were using the derrick it broke, and the lumber, being raised at the time, by reason of the breaking of the derrick, fell upon the appellee, bruising him and breaking his arm between the shoulder and the elbow; that appellee had surgical and medical attention, but the broken bone failed to unite, and formed what is called, sometimes, a "false joint." There was evidence tending to show that this failure of the bones to unite is a result which may be permanent, and that this difficulty resulted from want of care in appellee, or from bad surgery, or bad nursing, etc. There was also evidence tending to show that the injury may not be permanent, and that appellee used ordinary care, and employed surgeons, doctors and nurses of ordinary professional skill and care, and that the unfortunate result of the bones not uniting was caused by merely an error in judgment or exceptional negligence in those employed to treat him.

Isham, Lincoln, Burry & Ryerson, for the appellant.

John Lyle King, for the appellee.

DICKEY, J.—We cannot inquire into or consider the proposition of counsel for appellant, that, as he says, "the only causes of the injury were the carelessness of appellee and that of his fellow-servants." What was the cause of the injury, or the combination of causes producing the result, is a question of fact, which, by law, it is not the duty of this court to consider. So, also, is the question as to whether the damages are, or are not, excessive.

It is insisted that the court erred in permitting plaintiff to prove, in enhancement of his damages, that his arm, which was broken between the shoulder and elbow, was not cured, and that the parts of the bone, instead of uniting in one, had failed to unite, and formed what is called a "false joint." Appellant insists that this last was the result of bad surgery, and, to be proven, should have been set out as special damages, not being, as he suggests, such damages as ordinarily arise from a broken arm. We think the declaration is sufficiently specific to admit the proof. Whether this particular ailment (the false joint) was, or was not, the result of the breaking of the arm as a proximate cause, or the result of a new, independent factor, for which appellant was not responsible, could not be determined by the court as a question of law. It could be properly tested only by hearing the evidence and submitting the questions of fact to a jury, under appropriate instructions.

There is evidence tending to show that had this broken arm re-

ceived ordinary care and ordinary professional skill, the parts would have united with little or no permanent injury, and on this hypothesis alone appellant insists that the matter of this false joint should have been, at least hypothetically, excluded from the jury. We understand the law on this subject to be, that plaintiff cannot hold defendant answerable for any injury caused, even in part, by the fault of plaintiff in failing to use ordinary care or ordinary judgment, or for any injury not resulting from the fault of defendant, but caused by some new intervening cause not incident to the injury caused by defendant's wrong. Thus, in this case, if it be conceded that the false joint, under proper care and skill, would not have resulted from the breaking of the arm alone, but was brought about by the subsequent separation of the parts after they had been properly set, and before nature had formed a firm union, then, if this subsequent separation of the parts had been caused by an assault and battery by a stranger, or some foreign cause by which appellant had no connection, and which was not in its nature incident to a broken arm, plainly appellant ought not to be held to answer for the false joint; but if appellee exercised ordinary care to keep the parts together, and used ordinary care in the selection of surgeons and doctors, and nurses, if needed, and employed those of ordinary skill and care in the profession, and still by some unskillful or negligent act of such nurses, or doctors or surgeons, the parts became separated, and the false joint was

result, appellant, if responsible for the breaking of the arm, is to answer for the injury in the false joint. The appellee, an injured party, was bound by law to use ordinary care to render the injury no greater than necessary. It was therefore his duty to employ such surgeons and nurses as ordinary prudence in his situation required, and to use ordinary judgment and care in doing so, and elect only such as were of at least ordinary skill and care in their profession. But the law does not make him an insurer in a case that such surgeons or doctors, or nurses, will be guilty of negligence, error in judgment, or want of care. The liability to mistakes in curing is *incident* to a broken arm, and where mistakes occur (the injured party using ordinary care), the injury resulting from such mistakes is properly regarded as part of immediate and direct damages resulting from the breaking of

NOTE.

Without discussing each ruling of the court in the matter of instructions, it is sufficient to say that such rulings were at least as favorable to the appellant as the law would permit, and in some respects more so.

Finding no error in law in the record of the proceedings in the circuit Court, the judgment of the Appellate Court is hereby affirmed.

Judgment affirmed.

Injuries from Defective Derricks.—As to injuries from defective derricks see the following authorities. *Holden v. Fitchburg R. R. Co.*, 2 Am. & Eng. R. R. Cas. 94; *Derrenbacher v. Lehigh Valley R. R. Co.*, 4 Am. & Eng. R. R. Cas. 624; *Baker v. Alleghany V. R. R. Co.*, 8 Am. & Eng. R. R. Cas. 141; *Conlon v. Eastern R. Co.*, 15 Am. & Eng. R. R. Cas. 99; *Union Pac. R. R. Co. v. Fray*, 15 Am. & Eng. R. R. Cas. 158.

Duty of Injured Party as to Medical Assistance.—Where a personal injury occasioned by negligence is subsequently increased or aggravated through the fault of the person injured, the party causing the original injury is not liable for the increase or aggravation. *Atlanta & R. A. L. R. Co. v. Ayers*, 53 Ga. 12; *Bardwell v. Town of Jamaica*, 15 Vt. 488.

A person injured through the fault of another is bound to exercise reasonable care and skill in selecting a physician, but is not bound to employ the best professional assistants. *Collins v. City of Council Bluffs*, 82 Iowa, 824; *Rice v. City of Des Moines*, 40 Iowa, 638.

He cannot recover for injuries occasioned by his failing altogether to send for a physician. *Allender v. Chicago, R. I. & P. R. Co.*, 87 Iowa, 264.

Unskillful Treatment of Injury.—Where the person injured has, however, exercised reasonable skill and care in selecting a physician, the party causing the original injury is liable for any increased damages occasioned by unskillful treatment. *Stover v. Inhabitants of Bluehill*, 51 Me. 489; *Eastman v. Sanborn*, 3 Allen, (Mass.) 504; *Lyons v. Erie R. Co.*, 57 N. Y. 489.

Or even for death which ensues from such cause. *Santer v. New York, etc., R. R. Co.*, 66 N. Y. 50.

PRINGLE

v.

CHICAGO, R. I. & P. R. Co.

(*Advance Case, Iowa, October 28, 1884.*)

A brakeman in the employ of a railroad company was engaged in switching cars. He was on a car which was being pushed by an engine. At the proper moment he uncoupled the car and signalled to the engine to stop, sufficient momentum having been communicated when the engine was left some twelve or fifteen feet behind, thinking it had stopped, he jumped down on the track in pursuance of his duty, was struck by the engine which was still advancing and was injured. In an action against the railroad company to recover damages, *held*, that it was competent for plaintiff to show that the condition of the road-bed was such that he could not alight except upon the track.

The circumstances were such in the above case that plaintiff might very well have concluded that the engine had stopped and that it was safe for him to alight on the track. *Held*, therefore, that whether the engineer was negligent in running over the plaintiff or the plaintiff guilty of contributory negligence in alighting was for the jury.

It was not error to permit the plaintiff in his evidence to describe a "flying switch" when he did not state that the same was the transaction in the course of which the accident occurred. Particularly was this the case in view of the fact that the company defendant put in evidence a rule prohibiting their servants from making the "flying switch."

It was not error to permit the woman who nursed the plaintiff to testify that he had at the time of his sickness exhibited to her a piece of bone which he declared he had just taken out of the wound caused by the accident.

Evidence was admissible in the above case to show that plaintiff, upon resuming work after above accident, limped.

APPEAL from Van Buren District Court.

Action to recover on account of personal injuries sustained by plaintiff while in the employment of defendant as a brakeman, which are alleged to have been caused by the negligence of other employes of defendant engaged with plaintiff in operating the cars at the time of the injury. There was a verdict and judgment thereon for plaintiff. Defendant appeals. The facts of the case are fully stated in the opinion.

M. A. Low, for appellant.

W. M. Walker and *W. H. C. Jaques*, for appellee.

BECK, J.—The undisputed evidence in the case establishes the following facts: Plaintiff, while in the employment of defendant as a brakeman, was required, in the discharge of his duty, to assist his co-employes in attaching a car which stood upon a side track to the train he was engaged in operating. To do this it was necessary to draw the car backward, from the side track where it was found, to the main track, and then to move it by a forward motion of the engine through a switch to another side track, thus permitting the train to pass and be coupled to the car, taking it in the rear. This was done by what is called, in the language of the train men, "kicking." The engine is moved forward at sufficient speed to give the cars the momentum which will move it to the place where it is desired to have it, and while, in motion, the engine is uncoupled from the car, and is then stopped, as in this case was the purpose. When the engine and car had reached the main track from the side track first mentioned, they were stopped, and plaintiff, as required by his duty, went upon the "break-beam" of the car at the end next to the engine for the purpose of drawing the coupling-pin at the proper time, in order to permit the car to be "kicked" upon the side track. After sufficient momentum was obtained, he drew the coupling-pin, and gave the signal to stop the engine, and then, waiting until the car had moved sixty or seventy-five feet and had gained twelve to fifteen feet distance from the engine, he went from the "break-beam" to the track, stepping between the rails and very near one of them. He was almost immediately struck by the pilot, and his limbs were drawn under it. By clinging to the pilot he prevented his body from being drawn under it, and he was dragged in this position seventy-five feet, when the engine was stopped and backed, and he was thus released from the peril. His duty required him to couple the engine to the train which had been left on the main track, and to which the engine was to be "backed" after "kicking" the car. The plaintiff testifies that after giving the signal for stopping the engine, and after the car had gone sixty or seventy-five feet, gaining upon the engine twelve or fifteen feet, he believed that the engine had stopped, and therefore he

went to the ground, and that he alighted between the rails for the reason that the condition of the track would not permit him to alight outside of them. The foregoing facts are stated in the testimony of plaintiff, and are not contradicted by other witnesses. The engineer states that the engine could have been stopped in the distance of forty-eight or fifty feet. The fireman, when plaintiff pulled the coupling-pin, directed the engineer to stop the engine.

We shall proceed to the consideration of the objections to the judgment of the district court in the order we find them discussed in the printed argument of defendant's counsel. The plaintiff was permitted to testify, against defendant's objection, to the condition of the track, for the purpose of showing that he could not safely and without difficulty have reached the ground outside of the rails. The evidence, we think, was competent. It was plaintiff's duty, as soon as he could do so with safety, to leave the car in order to couple the engine to the train. This he was required to do expeditiously, that there should be no delay. If he could have alighted outside of the rails, there would have been no danger. The evidence sufficiently accounts for his not attempting to do so. If he could not alight outside of the rails, he was justified, as we shall soon see, in attempting to reach the ground inside of the rails, if it could have been done in the exercise of reasonable care and caution. The purpose of the evidence was not, as defendant's counsel insists, to establish the negligence of defendant in failing to have the track in proper condition.

The plaintiff was permitted to testify, against defendant's objection, that when he left the car he thought the engine "had plenty of time to stop," and had stopped. The plaintiff had directed, by proper signal, the engineer to stop the engine; he believed, from the fact that the distance between the car and engine had increased to 12 or 15 feet, that the speed of the engine was diminishing, and, according to the testimony of himself and the engineer, the engine had gone a distance sufficient to enable the engineer to bring it to a full stop. He was authorized by the law to trust in the care and diligence of the engineer, and to act in the belief that he had taken proper action to stop the engine. *Beems v. Chicago, R. I. & P. Ry. Co.*, 58 Iowa, 150; s. o., 6 Am. & Eng. R. R. Cas. 222; 10 Am. & Eng. R. R. Cas. 658; *Steel v. Central Ry. of Iowa*, 43 Iowa, 109. But if, notwithstanding, he knew the engine was approaching him at a dangerous speed, he would have been guilty of negligence in attempting to descend to the track, and he was not, in that case, justified in believing that the engine had stopped. But it must be remembered that in the position he occupied, being right before the engine upon the moving car, he could rest his eye upon no object, either on the car or upon the ground, which would enable him to determine readily

that the engine had not stopped. The forward movement of his body with the car, and the increasing separation of the car and engine, would, without the closest attention and reflection, after viewing the engine in its relation to objects upon the ground, induce the belief that the engine had stopped. He could not have determined, in the exercise of due care, that the engine had not ceased to move. He was authorized, therefore, to believe the engine had stopped, and he was not negligent in being mistaken in his belief. The evidence objected to was not in the nature of an opinion upon an important fact, as counsel for defendant claims, but affords proof that plaintiff was not negligent.

The plaintiff testified that a piece of the bone of his fractured leg came from an ulcer caused by the injury. A woman who nursed him while he was confined in his bed was, against defendant's objection, permitted to testify that plaintiff at the time called her to him and exhibited to her a piece of bone which he declared he had just taken from the wound. The evidence is competent, for the reason, if for no other, that it tended to corroborate plaintiff's testimony as to the extent of his injuries.

Certain witnesses were permitted to testify that after the injury plaintiff, while engaged in labor, limped. The objection raised by defendant to this evidence is not well taken. Surely, the fact that one limps while walking in the discharge of his ordinary duty is evidence of lameness, and indicates an injury of the limb and its extent. It is not in the nature of declarations, none of which were shown by the evidence in question.

The plaintiff in his testimony described, probably erroneously, what is called a "flying switch." He did not, however, say that it was made at the time of the accident. Defendant objected to this evidence. A rule of the defendant forbidding "flying switches" was introduced in evidence without objection. We cannot imagine that any prejudice resulted to defendant from the evidence. If the jury understood that the "flying switch" was made by plaintiff, which we think quite improbable, they would have understood that it was done in violation of a rule forbidding it, which would have been to the prejudice of plaintiff.

The plaintiff in an amended petition, in stating the circumstances of the accident, alleges that he got down from the car after he supposed the engine had stopped. This averment was repeated by the court below in stating to the jury the pleadings in the case. It is now made the ground of an objection to the judgment, for the reason that it may have justified the jury in holding that plaintiff's supposition was a material issue. The court surely did not refer to the allegation as raising an issue, but simply as an averment of a fact tending to show plaintiff's care. And, as we have pointed out in the third point of this opinion, this was a proper matter to be considered for that purpose. There

was no error in the instruction on account of the matter complained of by defendant.

The court below, in the fifth instruction, after directing the jury as to the effect of care and negligence of the engineer and fireman, in fixing defendant's liability, informed the jury that "they should next inquire, 'Was the plaintiff careless or negligent in what he did which contributed to the injury?'" We discover no fault in the instruction. It simply directs the jury that they should consider acts of negligence which contributed to the injury, and that other acts, not contributing to the injury, though they may have been negligent, ought not to be considered. Whether plaintiff was chargeable with contributory negligence was a question for the jury. But counsel for defendant insists that "the only negligence imputable to the plaintiff arises from the fact that he stepped down on the track in front of the moving engine," and "if that was negligence it was necessarily the proximate cause of his injury." The mere act of stepping down in front of the engine was not necessarily negligent. If plaintiff was authorized to believe that the engine had stopped or would be stopped before it reached him, he would not, as we have seen, be negligent, and while his act of stepping down was the proximate cause of the injury, it was not a negligent act which bars him from recovery. See *Crowley v. B., C. R. & N. Ry. Co. supra*.

The court, in the ninth instruction, directed the jury that the engineer was not bound to anticipate that plaintiff would step upon the track before the engine "unless ordinary care and prudence required him to anticipate such a movement." It is not now insisted that there was no evidence authorizing the jury to find that the engineer should have anticipated the movement of plaintiff. We think differently. The engineer knew that plaintiff was required to act with celerity in order that the train should not be delayed by his failing to be promptly on hand to couple the engine to it; that the engine could be stopped in the distance of about 50 feet; that it had run further than that distance, and that plaintiff was not in a position in which he could mark the movement of the engine so as readily to determine whether it had stopped; and, withal, that plaintiff, in the discharge of his duty, was required to leave the car just as soon as he believed that the engine had stopped. In our opinion, the jury could not have failed to find that ordinary care and prudence required the engineer to anticipate the movement of plaintiff.

The Court, in several instructions, directed the jury that if they found plaintiff stepped upon the track where a reasonably prudent man would not have done so, and that, although he may have given a signal to stop the engine, "yet he would have no right to suppose that it had so stopped, and to act on such supposition, when by the use of his eyes he could have easily seen that

it had not, if a person of ordinary care and prudence would have so used his eyes." We have pointed out that the plaintiff, in the exercise of ordinary care, could have stepped upon the track in the belief, warranted by the circumstances, that the engine had stopped or would be stopped; and that he could have well done this without the use of his eyes, which, as we have shown, would have aided him but little in determining the speed of the engine, or whether it in fact was moving. The instructions, surely, present the case as favorable to defendant as the law justifies.

Another instruction directed the jury that if they found plaintiff stepped upon the track in front of the engine so near as to render the act dangerous, he cannot recover. It is insisted that the instruction, in effect, took the case from the jury. But it must be considered in connection with other instructions, which pointed out that if the plaintiff did step before the engine in the exercise of reasonable care and prudence, he is not chargeable with negligence.

The instructions asked by defendant were either in conflict with those given or a repetition thereof, and were properly refused.

The evidence touching the negligence of defendant and the case of plaintiff sufficiently supports the verdict. We discover no ground for disturbing the judgment of the district court. It is therefore affirmed.

Coupling Cars.—As to the authorities upon injuries to servants received while coupling cars, see generally *Chicago, B. & Q. Ry. Co. v. Warner*, and note, *infra*.

LAWLESS

v.

CONNECTICUT RIVER RAILROAD COMPANY.

(136 *Massachusetts Reports*, 1.)

At the trial of an action against a railroad corporation for personal injuries occasioned to the plaintiff while in its employ as a brakeman, by reason of the draw-bar on a locomotive engine being too low for the work for which it was used, if the facts are in dispute, the defendant is not entitled to a ruling that, upon all the evidence in the case, the plaintiff cannot recover; and that, if the jury find that the only defect in the engine was the height of the draw-bar, the plaintiff cannot recover.

At the trial of an action against a railroad corporation for personal injuries occasioned to the plaintiff while in its employ as brakeman, by reason of the draw-bar on a locomotive engine being too low for the work for which it was used, the defendant has no ground of exception to a refusal to rule that "if the jury find that the conductor, or any person in charge of the cars at the time, directed the coupling of an engine to a car the draw-

bars of which were of unequal height, whereby the injury was caused, the plaintiff cannot recover, the injury being the result of the carelessness of a fellow servant."

The fact that a brakeman in the employ of a railroad corporation knew, or might have ascertained, that the draw-bars of a locomotive engine and of a car to which it was to be coupled by him while standing upon a plank in front of the engine, were of unequal height, so that they would be likely to pass each other instead of coupling together, though furnishing strong evidence of carelessness on his part, will not, as matter of law, preclude him from maintaining an action against the corporation for injuries occasioned by reason of the draw-bars so passing each other, that of the engine being too low for the purpose for which it was used.

TORT, for personal injuries occasioned to the plaintiff while in the defendant's employ as a brakeman, by a locomotive engine alleged to have been improperly constructed. At the trial in the superior court, before Gardner, J., the jury returned a verdict for the plaintiff in the sum of \$4,500; and the defendant alleged exceptions. The facts appear in the opinion.

G. Wells, for the defendant.

G. M. Stearns, for the plaintiff.

COLBURN, J.—The rules of law which are applicable to this case are well settled in this commonwealth.

It was the duty of the defendant to furnish a locomotive engine suitable for the work which it required the plaintiff to perform with it, and to exercise ordinary care in the performance of this duty, and it was responsible to the plaintiff, if he was using due care for an injury resulting from its negligence or want of ordinary care in this respect. It did not necessarily discharge this duty by entrusting it to suitable servants and agents, but was responsible for the negligence or want of ordinary care of such servants and agents in the performance of the duty required of them. Such servants or agents, in the performance of this duty, were not the fellow servants of the plaintiff, but were charged with the duty required of the defendant. *Ford v. Fitchburg Railroad*, 110 Mass. 240. *Holden v. Fitchburg Railroad*, 129 Mass. 268. *Hough v. Railway*, 100 U. S. 213.

If the engine was suitable for the work for which it was designed to be used and was used the defendant was not responsible to the plaintiff for an injury resulting from the manner in which it was used by his fellow servants.

It appeared in evidence that the engine in question was new when it came on the road of the defendant, some three or four months before the accident; that, during all the time it had been on the road, it was used as a "switcher;" that it had on the forward end a draw-bar or bunter, some of the witnesses giving it one name and some the other, the device serving the double purpose of draw-bar and bunter. The only defect claimed in the engine was, that this draw-bar was too low for the purpose for which

it was designed and used, so that it was liable to pass under the draw-bar or bunter of the car to which it was to be attached, and did so on the occasion of the accident. Whether the draw-bar was too low, and, if so, whether that rendered the engine unsuitable for the work for which it was designed and used, were questions for the jury.

The plaintiff, by engaging in the work he was doing, took all the risks ordinarily incident to that work. He was bound to exercise such care for his own protection as the kind of work in which he was engaged reasonably required. He had a right to assume that the defendant had furnished a suitable engine, but if he discovered, or by the exercise of ordinary care ought to have discovered, that the engine was defective because the draw-bar was too low, that was an important element in determining the degree and kind of care required of him in its use. The facts were in dispute. The testimony of the plaintiff was, in substance, that he had not been upon the engine much; that he did not think he had coupled a car to the front of the engine more than four times; that, when the engine first approached the car, it stopped ten feet from it; that he did not notice the height of the car, and did not know there was any danger that the bunter of the engine would pass under that of the car until he actually attempted to make the coupling and got hurt.

On the other hand, the engineer testified that the plaintiff had worked on the engine most of the time it had been in use; that, as the engine approached the car on the occasion in question the plaintiff jumped out and the bunter of the engine passed under that of the car; that he had a conversation with the plaintiff about this, and the necessity of using a crooked link, before the attempt to connect was actually made by the plaintiff. There was also other testimony bearing upon these points.

Whether the plaintiff was in the exercise of due care, under all the facts and circumstances which might be found to be established by the evidence, was for the jury. The court was not to pass upon the weight of the evidence, but only to determine whether there was evidence which should be submitted to the jury. *Forsyth v. Hooper*, 11 Allen, 419.

For these reasons we are of opinion that the defendant was not entitled to the first or second instruction requested.

The fourth instruction requested should not have been given. It does not include the element of knowledge of any difference in height, on the part of the person giving the direction, which would seem to be essential to render him careless. If it had included such knowledge, in giving it the court must practically have held that an employer would not be liable for an injury resulting from the use of an unsuitable machine, which he had negligently furnished for use, unless he personally gave the direction to use it. *Cayzer v. Taylor*, 10 Gray, 274.

The third and fifth requests raise substantially the same question, and may be considered together.

We are of opinion that the defendant was not entitled to have these instructions given without qualification. We do not think the existence of the facts supposed would show the plaintiff's carelessness so clearly and beyond all controversy that it should be held as a matter of law that, if these facts were found, he could not recover, though they might furnish strong evidence of his carelessness. *Snow v. Housatonic Railroad*, 8 Allen, 441; *Gaynor v. Old Colony & Newport Railway*, 100 Mass. 208; *Chaffee v. Boston & Lowell Railroad*, 104 Mass. 108.

The fact that a person voluntarily takes some risk is not conclusive evidence, under all circumstances, that he is not using due care. *Thomas v. Western Union Telegraph*, 100 Mass. 156; *Mahoney v. Metropolitan Railroad*, 104 Mass. 73. The plaintiff was engaged in performing the duty required of him, and it was necessary that the cars should be moved quickly to make way for an expected train. If the plaintiff had the knowledge supposed in the requests for instructions, the question of his due care depended to some extent upon the view the jury might take of his necessity for immediate action, the distance the bunters would have to pass each other before the car and engine would come so near together to injure him, the speed at which the engine was moving, the knowledge he had that the engineer knew the danger, the confidence he was entitled to have that the engineer would so manage the engine as not to injure him, the reliance he was reasonably entitled to place upon his ability to make the connection so as to prevent the bunters passing, and probably other circumstances.

Under all the instructions given we do not think the jury were likely to be misled.

Exceptions overruled.

Injuries Arising from Cars with Coupling of Unequal Height.—There are several authorities holding that a servant upon a railroad is not entitled to recover damages for an accident occasioned by the simple fact that cars in the same train happen to have couplings of unequal height. *Fort Wayne, J. & S. R. R. Co. v. Gildersleeve*, 88 Mich. 188; *Botsford v. Central Michigan R. Co.*, 88 Mich. 256; *Hodgkins v. Eastern R. Co.*, 119 Mass. 419; *Hulett v. St. Louis, R. C. & N. R. Co.*, 67 Mo. 239; *Toledo, etc., R. Co. v. Asbury*, 84 Ill. 429.

But see *Muldowney v. Illinois Central R. Co.*, 36 Iowa, 462; *Penna. Co. v. Long*, 15 Am. & Eng. R. R. Cas. 845.

Coupling Cars.—As to the authorities upon injuries to servants received while coupling cars, see generally, *Chicago, B. & Q. R. Co. v. Warner*, and note, *infra*.

CHICAGO, BURLINGTON & QUINCY RAILROAD CO.

v.

WARNER.

(108 *Illinois Reports*, 538.)

Where a railway company has in use on its road, freight cars without end ladders, steps and handles, which are necessary in coupling or uncoupling while the cars are in motion, and a freight conductor is cognizant of this fact, it is clearly his duty, before attempting to pass from the side to the end of the car for the purpose of uncoupling it, to ascertain whether it is one of that kind, and if he finds it is, it is negligence on his part to attempt to make the uncoupling while the train is in motion.

In cases of negligence resulting in the infliction of a personal injury, the damages, to a large extent, rest in the discretion of the jury. About all the court can do is to confine the jury in their assessment to such damages as are shown by the evidence to result necessarily from the injury complained of.

No proof is required of facts which everybody is presumed to know. When such facts become material, it is the duty of courts and jurors to take notice of them, and act upon without proof.

So in a suit to recover damages for the loss of an arm, etc., no proof to show that such loss would impair the party's ability to pursue his ordinary business is necessary, upon which to base an instruction relating to damages growing out of the want of such ability.

Proof of the crushing and mangling of a plaintiff's arm from the fingers up to within a few inches of the shoulder, and of its subsequent amputation at the shoulder, is sufficient evidence of such degree of pain on his part as to make it a proper element to be considered by the jury in estimating damages.

In a case against a railroad company to recover damages for a personal injury, where several acts and omissions of duty were charged as negligence and the cause of the injury, it was *held*, that a failure to prove each and all of the alleged acts and omissions did not constitute a variance.

An instruction in an action to recover for a personal injury resulting in the loss of an arm, etc., informed the jury that in case they found for the plaintiff it would be proper to consider certain things, and "all damages, present and future, which, from the evidence, can be treated as the necessary and direct result of the injury complained of:" *Held*, that the instruction was not subject to the objection of leaving a question of law to the jury.

Instructions should be based upon evidence relating to the general or some particular aspect of the case, and it is the duty of the court to determine in the first place whether there is any evidence relating to the hypothesis assumed by a particular instruction. So if there is evidence tending to prove a fact, an instruction that if such fact is not proved the verdict should be a certain way, is erroneous, as not being based on evidence, and so submitting a question of law to the jury.

One of the main issues in an action against a railroad company was, whether the injury of the plaintiff was caused by the negligence of the company in its failure to furnish a car in question with proper steps or an end ladder. An instruction was asked, that if the jury believed, from the evidence, that the plaintiff had, before the trial, made written statements of the cause of the accident to an agent of the defendant, wherein he attributed the accident to the manner in which the engineer slacked up the train,

and the way in which the car door slid, as well as to the absence of a step, and that such statements were true, and that the accident could not have happened if the engineer had not slackened up as he did, the plaintiff could not recover. It was *held*, the instruction was properly refused, as it gave undue prominence to a part of the evidence, and tended to divert the attention of the jury from the main issue, and cause them to decide the whole case upon a mere subordinate issue.

Whether there is any evidence upon a given point or issue, or not, is purely a question of law to be determined by the court, and it is not proper to submit such question to the jury.

If a reviewing court can see that a case has been fairly tried, and that the judgment is clearly right upon the facts or merits, and that another trial would result the same way, it will not reverse because of an error in the giving or refusing of an instruction. But when the case is a close one on the facts, and the evidence is about evenly balanced, a reversal will be had for any substantial error in the trial court on a material question that may have turned the scale in favor of the successful party.

By pleading the general issue the defendant admits the sufficiency of the declaration, which he cannot afterward question by motion to exclude the evidence under it. To question the sufficiency of a declaration the defendant should demur to it, or move in arrest of judgment.

APPEAL from the Appellate Court for the first district; heard in that court on appeal from the Circuit Court of Cook county.

Melville W. Fuller, for appellant.

Thomas Cratty and *W. S. Johnson*, for appellee.

MULKEY, J.—On the 10th of August, 1877, Samuel Warner, the appellee, brought an action on the case in the Cook Circuit Court, against the Chicago, Burlington & Quincy Railroad Company, the appellant, to recover damages for personal injuries received by him while in the employment of the company, and which are claimed to have been occasioned through its negligence. There was a trial on the merits in the circuit court, resulting in a verdict and judgment in favor of appellee, and against the appellant, for \$5,000. This judgment, on appeal to the appellate court for the first district, was affirmed, and the company brings the case here for review.

The accident giving rise to the present suit occurred about two o'clock in the morning of the 20th of August, 1875, at Buda, Bureau county, this State, on the main track of the company's road. Appellee had been in the company's service about six years—the first four as brakeman, and the last two as freight conductor. At the time of the accident he had charge of a freight train, and was proceeding to uncouple and detach a car therefrom, the train at the time being in motion. For this purpose, by means of steps running up the side and near the end of the car, he had climbed about half way up to the top, when, standing upon one round of the steps and holding with one hand to another, he threw himself around the corner of the car, expecting to get hand and foothold on similar steps on the other side, from whence he could easily have passed to the dead-wood in the center of the end of the car, where

the uncoupling had to be made, but it so happened the car in question had no such steps on it, and there being nothing there which he could take hold of, appellee lost his balance and fell between the rails of the track, the moving train passing over his body. In doing so the iron rods under the center of the brake-beam came in contact with his left arm, crushing and mangling it from the fingers up to within about four or five inches of the shoulder, where, by reason of the injury thus received, it was subsequently amputated.

The negligence with which the company is charged, and which is relied on for a recovery by appellee, is the company's failure to provide the car in question with end steps or ladder to be used in making couplings and uncouplings, and for other purposes. It is alleged, in substance, in each of the three counts of the declaration, that it was the duty of the defendant "to provide only properly and carefully constructed cars, with end ladders, side handles and steps thereto attached," and that by reason of its failure to do so the injury in question occurred. A direct issue was formed upon this averment in the declaration of the defendant's plea, and the same has been conclusively settled against the appellant. It remains, therefore, to inquire what, if any, errors of law appear of record requiring a reversal.

It is first objected the court erred in giving the plaintiff's third instruction. It is as follows:

"If, under the evidence and instructions of the court, the jury find the defendant guilty, then, in estimating the plaintiff's damages, it will be proper for the jury to consider the effect of the injury in future upon the plaintiff, the use of his arm, and his ability to attend to his affairs generally, in pursuing any ordinary trade or calling, if the evidence shows that these will be affected in the future, and also the bodily pain and suffering he sustained, and all damages, present and future, which, from the evidence, can be treated as the necessary and direct result of the injury complained of."

The first two objections to this instruction, as stated in the counsel's own language, are: First, "there was no evidence that the loss of Warner's arm did, or would, impair his ability to pursue his business, much less to the extent of which said ability would be lessened." Second, "there was no evidence of the extent of the pain Warner had suffered, other than the loss of his arm, and that pain, as an element of damage, could not be inferred from that fact." The third objection goes to the language used in the concluding part of the instruction, namely, "and all damages, present and future, which, from the evidence, can be treated as the necessary and direct result of the injury complained of." The specific objections to the use of this language are: First, "there was no evidence to base it upon;" and second, "it left a question

of law to the jury." It will be perceived these several objections, except the last, substantially amount to the same thing, and may therefore be properly considered together. The only difference in them is, that they respectively relate to separate parts of the instruction, or to distinct elements of damage contemplated by it; but they are all placed upon the same common ground, namely, that there is no evidence upon which to base the instruction.

We are unable to agree with counsel that the proof of the crushing and mangling of plaintiff's arm from the fingers up to within a few inches of the shoulder, and of its subsequent amputation at that place, as is shown by undisputed testimony, affords no evidence of that degree of pain which would make it a proper element to be considered by the jury in estimating the damages. The rules of evidence are but the product of human experience and common sense, and hence they never require the performance of an unnecessary or useless thing. One of the most elementary of these rules is, that no proof is required of facts which everybody is presumed to know. When such facts become material in a legal controversy, it is the duty of courts and juries to take notice of them, and act upon them without proof. It is also part of the common experience of all, that many facts are so intimately connected with and dependant upon each other that the proof of one necessarily establishes the other, or at least affords so strong a presumption of the latter's existence that no additional proof of it will be required until such presumption is overcome by countervailing testimony. In fact the whole theory of inductive proof is but the practical application of this fundamental principle. 1 Wharton on Evidence, Sec. 327, *et seq.* To satisfactorily prove a given act also establishes, at least *prima facie*, the ordinary and probable consequences of such act; and as pain uniformly follows the crushing of a bone or the laceration of the flesh of one in a normal condition, which is always presumed when nothing to the contrary appears, the jury in this case were fully warranted in inferring the fact of pain from the character of appellee's injuries, which were fully shown—hence it cannot be truthfully said there was no evidence to base the instruction upon, so far as it related to the pain or suffering of appellee. Indeed, we do not think any general words of the witness, such as, "I suffered a great deal," "The pain was very severe," and the like, would have marked more definitely the quantum or degree of suffering than the simple recital of the mangled condition of the arm, requiring its amputation.

But it is suggested that while some pain might be inferred from the injury itself, yet the extent of appellee's sufferings should have been otherwise shown in order to make it an element in the assessment of damages. This position is clearly not tenable, either upon reason or authority. Where, in such case, the law permits a

recovery at all, the plaintiff will be entitled to some compensation for his sufferings, whether they be much or little, and the fact that the amount of suffering is not definitely fixed by the testimony, if, indeed, that is possible in any case, will make no difference in this respect. In all cases like the present, where a recovery is permitted at all, if there is any evidence tending to prove the fact of pain, whether much or little, it is the right of the plaintiff to have the jury instructed, if they shall so find the fact, to take it into account in making up their verdict.

All that is here said is equally applicable to the objection, "there was no evidence that the loss of Warner's arm did, or would, impair his ability to pursue his ordinary business," etc. At the time of receiving the injury his business was that of railroad-ing. He had made his way up from a brakeman to a conductor of a freight train. By reason of the accident he lost his position as an employé of the company, and it is manifest, from the loss of the arm itself, that he could not successfully, if at all, follow that business any longer, and the fact he was forced to abandon it was before the jury. That both arms are useful at all, and indispensable in most, of the avocations of life, is but a part of the common information of mankind in general, and hence it required no other proof to establish it. With these facts before the jury, it is difficult to understand by what process of reasoning the conclusion is reached there was no evidence upon which to found the instruction, so far as it related to the impairment of appellee's ability to pursue his ordinary business by reason of the loss of his arm.

What we have already said fully applies to the first branch of the objection relating to the concluding part of the instruction, and is deemed a sufficient answer thereto.

We do not think there is any just ground for the claim that the latter clause of the instruction left a question of law to the jury. As we understand it, it simply tells the jury in making up their verdict they should take into account all such damages, whether present or future, as are shown by the evidence to be the necessary and direct result of the injury complained of. We see nothing improper in this. It was not necessary, nor, indeed, would it have been proper, for the instruction to have gone on and attempted to enumerate the various circumstances or possible contingencies in which appellee would probably suffer loss or inconvenience by reason of the injury. Nor was it necessary for the court, unless asked to do so, to define what was meant by the term "damages." In cases of this character the damages necessarily rest, to a large extent, in the discretion of the jury, for the law affords no measure or rule by which they may be even approximately ascertained. About all the court can do in such cases is to confine the jury, in their assessment, to such damages as are shown by the evidence to necessarily result from the injury complained of, and that was done in this case.

It is also contended the plaintiff failed to prove his case as laid in the declaration, and that the court therefore erred in not excluding the evidence from the jury. We do not concur in this view. The mistake of appellant on this branch of the case is in assuming that appellee bases his right of recovery exclusively upon "the original improper construction of the car." It is true the declaration proceeds upon this theory, but not upon this theory alone, for, as already shown, it is expressly averred in the amended declaration, that it was the duty of the defendant "to furnish for the use of its employes properly and carefully constructed cars, with end ladders, side-handles and steps attached thereto;" and the declaration further on expressly negatives the performance of this duty. This being so, the plaintiff was not bound at his peril to prove both branches of his case—it was sufficient if he proved either. It is a familiar doctrine of the law, that all torts are severable, and therefore, in an action *ex delicto*, it is immaterial that all the averments of the declaration are not proved as laid—it is sufficient if such of them as are so proved show a good cause of action. Applying this principle to the question in hand the position of appellant is clearly not tenable.

To the suggestion that the declaration was fatally defective, and the motion to exclude the evidence should therefore have been sustained, it is sufficient to say that the defendant, by pleading to the merits, admitted the sufficiency of the declaration, and it is not readily perceived how its sufficiency could be subsequently raised by a mere motion to exclude the evidence from the jury. We are aware of no practice authorizing such a course. If the defendant desired to question the sufficiency of the declaration, it should have demurred, or moved in arrest of judgment. *Chicago, Burlington & Quincy R. R. Co. v. Harwood*, 90 Ill. 426; *Roberts v. Corby*, 86 *id.* 182. Having done neither, it is unnecessary to determine whether the plaintiff was bound to aver in the declaration he had no notice of the defective construction of the car, as the declaration was clearly sufficient after verdict.

Appellant also complains of the action of the court in refusing to give defendant's fifth instruction as asked, and in modifying it, and giving it to the jury as modified. The instruction, as originally drawn, is as follows:

"If the jury believe, from the evidence, that the plaintiff, in October, 1875, and in November, 1875, made written statements of the cause of the accident in question to the division superintendent of the defendant company, that therein he attributed the accident to the manner in which the engineer slacked up, and the way in which the car door slid, as well as to the absence of a step, and that such statements as to the cause were true, and the accident could not have happened if the engineer had not slacked up as he did, then the plaintiff cannot recover under the declaration in this case, and the verdict should be not guilty."

The court, before giving this instruction, struck out the concluding words, "and the verdict should be not guilty," and added the following: "But the court further instructs the jury, that it is for them to determine whether any statements made by the plaintiff to the division superintendent correctly set forth the cause or causes of the accident, and from all the evidence, and under the instructions of the court, determine the issues in the case."

The instruction, as originally drawn, was properly refused. It not only gave undue prominence to certain parts of the testimony, but if given it would have tended to divert the attention of the jury from the main issue, namely, whether the injury to the plaintiff was caused by the negligence of the company in its failure to furnish the car in question with proper steps or end ladder, and would probably have caused them to decide the whole case upon a mere subordinate issue, namely, whether the plaintiff had not made previous statements relating to that subject, inconsistent with his present testimony. An instruction having such a tendency should never be given. It is very questionable whether the instruction, as given, was entirely relieved from its objectionable features in this respect, but it is very clear there is nothing in the modification of which the appellant has any just cause of complaint. *Hatch v. Marsh*, 71 Ill. 370; *Ogden v. Kirby*, 79 *id.* 555; *Evans v. George*, 80 *id.* 51; *Martin v. Johnson*, 89 *id.* 537.

It is also objected that the court erred in refusing the following instruction:

"In the absence of evidence tending to show that steps and handles are necessary to safety in coupling and uncoupling, the verdict should be not guilty."

This instruction was clearly erroneous, and was, therefore, properly refused. Instructions should be based upon evidence relating to the general or some particular aspect of the case, and it is the duty of the court to determine, in the first place, whether there is any evidence relating to the hypothesis assumed by a particular instruction. If, as contemplated by the instruction in question, there was no evidence tending to show steps or end ladders were necessary to safety in coupling and uncoupling, the jury should have been told to find for the defendant, for the plaintiff's whole case depended upon the negative of that hypothesis. On the other hand, if, in the opinion of the court, there was such evidence, it was not applicable to the case made by the proofs, and was therefore calculated to mislead. But the manifestly fatal objection to the instruction is in referring the question whether there was any evidence upon the point covered by the instruction to the jury. That, of course, is a pure question of law, which the court alone should have determined.

In this connection it is urged, with much earnestness and apparent confidence, that there was no evidence before the jury

tending to show that steps or ladders at the ends of cars were necessary to safety in coupling and uncoupling. The evidence certainly tends to show that it was customary and proper to sometimes make couplings and uncouplings when trains were in motion, and for this purpose the party performing the service had, by some means or other, to pass either from the side or top of the car to the dead-wood, in the center of the end of the car, and in doing so it is manifest something was required to rest the foot on or hold by, if not both. To meet this requirement, as is shown by the evidence, some cars are provided with platforms on the ends, while most of them at that time were furnished with something like ladder rounds, attached to the ends of the cars, both at the top and bottom, those at the top being used mainly for hand hold, and those at the bottom to stand on. The former were called "handles," and the latter "steps." Sometimes these rounds extend all the way up, from top to bottom, and then they are called "ladders." It will be borne in mind the negligence complained of is the failure of the appellant to furnish either the steps, handles or ladder, and the evidence shows the car in question had none of these appliances, or any of any kind whatever. Now, when it is considered the evidence does show or at least tends to show that it was one of the duties of appellee, as he swears it was, to couple and uncouple cars when the train was in motion, and this could not be done with safety, if at all, without some of these appliances, or others answering a like purpose, and that in the present case there were none of any kind, and that, as appellee positively swears, by reason of their absence the injury complained of occurred, it is difficult to conceive how it can be seriously contended there was no evidence before the jury tending to show that these steps, handles or ladders were necessary. The very fact the evidence tends to show they are, or at least were at that time, in general use, is certainly some evidence they were so regarded at that time.

It is also objected that the trial court erred in refusing to give appellant's second instruction as asked, and also in modifying it, and giving it to the jury as modified. From the proofs in this case there is little, if any, ground to doubt the appellant was using on its road other cars without end steps or ladders besides the one in question, and there is also evidence tending to show this fact was known to the appellee. Assuming that a part of the appellant's cars then in use were of that kind, and that the appellee had knowledge of the fact, it was clearly his duty, before attempting to pass from the side to the end of the car in the manner he claims he did, for the purpose of uncoupling it, to have ascertained whether it was one of that kind or not, and if he found it was, it certainly would have been negligence on his part to attempt to make the coupling in the manner he did. Nor, with a view of

directing the attention of the jury specially to this aspect of the case, appellant's counsel asked the court to give the jury the following instruction, being the one just alluded to :

"The jury are instructed, as a matter of law, that it was the duty of the plaintiff, before attempting to uncouple the car in question, to use ordinary and reasonable care to ascertain whether it was safe to do so, or not, while the train was in motion ; and if the jury believe, from the evidence, that it was not safe for the plaintiff to uncouple said car at the time he attempted it, and that the plaintiff knew, or might by the exercise of ordinary care have known that it was not safe to attempt it, then the plaintiff cannot recover, and the verdict should be for the defendant."

Which the court refused to do, but gave as a substitute for it the following :

"The jury are instructed, as a matter of law, that it was the duty of the plaintiff before attempting to uncouple the car in question while the train was in motion to exercise great care and caution to prevent being injured ; and if the jury believe, from the evidence, that it was not safe for the plaintiff to uncouple said car at the time he attempted it, and that the plaintiff knew, or might by the exercise of ordinary care have known, that it was not safe to attempt it, then the plaintiff cannot recover, and the verdict should be for the defendant."

We perceive no objection to the instruction as originally asked. As drawn it would have accomplished the object for which it was prepared—the substitute did not. The original told the jury, in plain, unequivocal terms, "it was the duty of the plaintiff, before attempting to uncouple the car in question, to use ordinary and reasonable care to ascertain whether it was safe to do so, or not, while the train was in motion." Now, this proposition (the leading one in the instruction, and which, under the proofs, is entirely accurate) is not found in the substitute, nor is its equivalent. To tell the jury, as was done in the substitute, "that it was the duty of the plaintiff, in attempting to uncouple the car while the train was in motion, to exercise great care and caution to prevent being injured," is quite a different thing from telling them that it was his duty *before* attempting to uncouple the car to use ordinary and reasonable care *to ascertain* whether it was safe to do so, or not, while the train was in motion. The care and diligence contemplated by the original instruction, on the part of the plaintiff, was required to be exercised *before* attempting to uncouple the car ; that contemplated by the substitute, *while* attempting to uncouple. The two ideas are radically distinct, as will fully appear from a moment's thought. Under the substitute, so far as the first proposition in it is concerned, the jury might very well have concluded, that however rash or grossly negligent the undertaking may have been, yet if the plaintiff used due care and caution *while* the coupling was

being attempted, he might nevertheless recover; and conceding this view is modified by the latter branch of the instruction, still the instruction, as a whole, was sufficiently uncertain as to have misled the jury; at any rate, it did not state the proposition of law announced by the original instruction, and cannot, in any legal sense, be regarded as its equivalent.

We are of opinion the court erred in refusing the instruction as asked, and the judgment should have been reversed by the appellate court for that reason. An error of this kind, as is well known, does not, and ought not always to reverse; but every case in this respect must depend upon its own circumstances. Where the reviewing court can see the case has been fairly tried, and that the judgment is clearly right upon the facts, and that consequently another trial must necessarily result the same way, it will not reverse on the ground an erroneous instruction may have been given or a proper one has been refused. Quite a different rule prevails where the case is a close one on the facts. In such a case, where the evidence is about evenly balanced, the reviewing court will reverse for any substantial error in the trial court on a material question, that may have turned the scale in favor of the successful party. The present case we regard as coming within this rule.

The judgment of the appellate court is reversed, and the cause remanded, with directions to reverse the judgment of the circuit court and remand the cause for further proceedings in conformity with this opinion.

Judgment reversed.

Injuries from Coupling Cars.—The reader is referred to the following cases, already published in our series, relative to injuries received while coupling cars. In these cases, with the accompanying annotations, will be found a full discussion of the subject: *Michigan Central R. Co. v. Smithson*, 1 Am. & Eng. R. R. Cas. 101; *Day v. Toledo C. S. & D. R. Co.*, 2 Am. & Eng. R. R. Cas. 126; *Atchison, T. & S. F. R. Co. v. Plunkett*, 2 Am. & Eng. R. R. Cas. 127; *Smith v. Potter*, 2 Am. & Eng. R. R. Cas. 140; *Hamilton v. G. H. & S. A. R. Co.*, 4 Am. & Eng. R. R. Cas. 528; *Nashville, C. & St. L. R. Co. v. Wheeler*, 4 Am. & Eng. R. R. Cas. 633; *Houston & T. C. R. Co. v. Willie*, 5 Am. & Eng. R. R. Cas. 541; *Ferguson v. Central Iowa R. Co.*, 5 Am. & Eng. R. R. Cas. 614; *Atchison, T. & S. F. R. Co. v. Brown*, 6 Am. & Eng. R. R. Cas. 228; *Wabash v. Lake Shore & M. S. R. Co.*, 8 Am. & Eng. R. R. Cas. 98; *Houston & T. C. R. Co. v. Myers*, 8 Am. & Eng. R. R. Cas. 114; *King v. Ohio Ctr. R. Co.*, 8 Am. & Eng. R. R. Cas. 119; *Batterson v. Chicago & G. T. R. Co.*, 8 Am. & Eng. R. R. Cas. 123; *Baird v. Chicago, R. I. & P. R. Co.*, 8 Am. & Eng. R. R. Cas. 128; *Beems v. Chicago, R. I. & P. R. Co.*, 10 Am. & Eng. R. R. Cas. 658; *Missouri Pac. R. Co. v. Loyde*, 11 Am. & Eng. R. R. Cas. 188; *Fay v. Minneapolis & St. L. R. Co.*, 11 Am. & Eng. R. R. Cas. 193; *Watson v. Houston & T. C. R. Co.*, 11 Am. & Eng. R. R. Cas. 213; *Lake Erie & W. R. Co. v. Everett*, 11 Am. & Eng. R. R. Cas. 221; *Baird v. Chicago, R. I. & P. R. Co.*, 12 Am. & Eng. R. R. Cas. 75; *Skeoconger v. Chicago & N. W. R. Co.*, 12 Am. & Eng. R. R. Cas. 206; *Whitman v. Wisconsin & M. R. Co.*, 12 Am. & Eng. R. R. Cas. 214; *Hathaway v. Michigan Cent. R. Co.*, 12 Am. & Eng. R. R. Cas. 249; *Northern Central R. R. Co. v. Husson*, 12 Am. & Eng. R. R. Cas. 241; *Chicago Ctr. R. Co.*

v. Clark, 15 Am. & Eng. R. R. Cas. 261; *Burlington, C. R. & N. R. Co. v. Coates, Adm'r*, 15 Am. & Eng. R. R. Cas. 265; *Brown v. Atchison, T. & S. F. R. Co.*, 15 Am. & Eng. R. R. Cas. 271; *Louisville Ctr. R. Co. v. McCoy*, 15 Am. & Eng. R. R. Cas. 277; *Houston & T. C. R. Co. v. Pinto*, 15 Am. & Eng. R. R. Cas. 286; *Renwick v. Chicago, R. I. & P. R. Co.*, 15 Am. & Eng. R. R. Cas. 288; *Tierney v. Burlington, C. R. & N. R. Co.*, 15 Am. & Eng. R. R. Cas. 290; *Pennsylvania Co. v. Long*, 15 Am. & Eng. R. R. Cas. 345; *Pringle v. Chicago, R. I. & P. R. Co. supra*; *Lawless v. Connecticut River R. Co. supra*.

NEW ORLEANS AND NORTHEASTERN R. R. Co.

v.

REESE.

(61 *Mississippi Reports*, 581.)

A railroad company is not responsible for the wrongful act of a contractor in taking trees from the land of another in procuring material to be furnished under his contract. If the party acted as agent or employé of the company it would be liable.

Where a party who is engaged in constructing part of the road-bed of a railroad employs laborers whose names are entered on the pay-roll of the company and are in fact employées of the company and receiving their pay from the company, and the party engaging them was merely the instrument of employing them for the company, this would fix his relation to the company as its servant.

K.'s contract with the railroad company was that he should complete the job which M. had, and was to be paid for it what the material and labor to be procured and furnished by him should cost, and ten per cent. additional to that as his compensation. *Held*, that this did not make K. the servant of the company. so as to render it liable for his wrongful act in taking the trees.

APPEAL from the Circuit Court of Lauderdale county.

F. E. Reese brought an action of trespass against the appellant railroad company to recover the statutory damages of fifteen dollars per tree for seventy-nine trees alleged to have been cut and taken by the company from his land without his permission. Reese obtained a judgment in the lower court, from which the railroad company appeals. The determining question in the case was whether one Kamper, who cut the trees in controversy, was in so doing acting as the servant or agent of the railroad company or was acting as an independent contractor.

The testimony is somewhat conflicting, and is not clear on either side.

S. Whinery, the engineer of the company, who had charge of the construction of that division of the defendant's road on which the trees were used, testified as to Kamper's relations to the road as follows: "One Mulholland had contracted to do the work and had failed. His contract was therefore declared forfeited. With

the approval and consent of the officials of the company, I made a verbal contract with Mr. Kamper to go on and complete the work, agreeing to pay him his cost and ten per cent. additional to the cost for his profit. That arrangement was carried out. The company took no part whatever in the getting of the timber. Mr. Kamper got the timber. The officers knew nothing of where he was getting the timber. The understanding was that Kamper was to complete the work according to the contract and specifications with Mulholland. Mr. Kamper completed the work and was paid accordingly. In respect to the work to be done by Mr. Kamper, my duty was to see that the work was done according to contract; *and the company had to pay Kamper what Kamper had to pay* for all labor and material used in the construction of the road, the hands to be hired and the materials to be purchased by Kamper. He took hold of the work just as Mulholland had left it, and part of the materials were on the ground. The ten per cent. was to cover the use of the tools which he furnished and a reasonable profit to him."

One witness for the plaintiff testifies that Kamper told him that he was not a contractor but merely an agent for the company. This statement Kamper denied when on the witness stand. It was shown by the hands employed by Kamper that the time of their work, while working under Kamper, was kept by a timekeeper of the railroad company, who gave them the certificates upon which they were to receive their pay; that while they worked under Mulholland the company did not keep their time.

The giving of the following instructions for the plaintiff is one of the errors assigned: "If the jury believe from the evidence that the contract with John Kamper and defendant was that Kamper should complete the work left unperformed by Mulholland in the construction of a part of defendant's road-bed, and that Kamper should furnish all materials, tools, and hire all hands, and that he, Kamper, should be paid by the defendant exactly what he, Kamper, should pay out for such purposes and ten per cent. additional for his services, then Kamper was the agent of the defendant."

The following instruction with others was asked by the defendant and refused: "There being no evidence that Kamper was the servant of the defendant, or that the company authorized the alleged trespass, the jury will find for the defendant." The refusal of this instruction is assigned for error.

J. W. Fewell, for the appellant.

Dial & Witherspoon, for the appellee.

CAMPBELL, C. J.—The important question in this case is, whether Kamper was the servant of the appellant or an independent contractor. If he was a mere employé and servant, the ap-

pellant was liable for his wrongful act in taking trees from the land of the appellee. If he was a contractor engaged in his own business under the contract, and pursuing his own methods in procuring the materials he was to furnish, the appellant was not responsible for his acts. The evidence contained in the record makes it very doubtful what was the relation sustained by Kamper to the appellant. That Mulholland was an independent contractor is conceded. The contract with Kamper was that he should complete the job which Mulholland had, and was to be paid for it what the materials and labor to be procured and furnished by him should cost and ten per cent. additional to that for his compensation. The court instructed the jury that this contract made Kamper the agent of the appellant, and made it responsible for his wrongful act in getting trees from the land of the appellee. This was in effect to determine that the mere mode of payment is the true criterion by which to fix the character of one as an employé or contractor, which is not correct. The mode of payment is a circumstance of much weight in solving the question, but it is not decisive and should not have been made so. Mr. Kamper may have been the agent of the appellant through whom it purchased and paid for materials and labor to carry on its work of constructing the trestles, and it may consequently be liable for his acts in the conduct of its business, but that does not appear sufficiently to enable us to say that he was such agent. Certain it is, that the mere manner of compensating him for his connection with the work is not decisive of his relation to the appellant. If Kamper was engaged as the mere instrument through whom the appellant was to procure materials and labor to be paid for by the company as the expenditure was made in its behalf by Kamper—in other words, if he was the disbursing agent of the appellant, engaged to get materials and labor for it, and to be paid for his services a compensation measured by his disbursement for the company—he was its agent and it is responsible for his acts as such. There are some facts in evidence suggestive that this may have been the case, but they are too meagre to authorize a conclusion. It is shown that the appellant had a "timekeeper" in the person of one who took notice of those who labored at the work under Kamper's employment, and gave laborers certificates showing the time for which they labored, so that they could get their pay; but this may have been a proper precaution by the appellant against being required by Kamper to pay for more labor than was performed, and it is not shown whether Kamper or the appellant paid the laborers. If their names were on the pay-roll of the appellant, and they were in fact employés of the appellant, and its timekeeper gave them certificates to enable them to get pay from the appellant, and it was their paymaster, and Kamper was merely the instrument of engaging them for the company, this would fix his relation to the company as its mere servant.

We strongly suspect that Kamper was the servant of the appellant and not an independent contractor, and would not disturb the verdict but for the fact that the court erred in directing the jury, and the evidence is not full and satisfactory enough to authorize an affirmance of the judgment notwithstanding the error of law.

In another trial a full investigation may be had of the contract and course of dealing between the appellant and Kamper, which should leave no doubt of the precise character of the relation between them.

Reversed and remanded.

Company not Liable for Contractor's Trespasses.—When a railroad company employs a contractor to build its road, it is not ordinarily liable for his wrongful acts constituting trespass upon real property on or near the line of the railroad. *Clark v. Vermont & Canada R. Co.*, 28 Vt. 103; *Eaton v. European & N. A. R. Co.*, 59 Me. 529; *Callahan v. Burlington & M. R. Co.*, 23 Iowa, 542; *Clark v. Hannibal & St. Joe R. R. Co.*, 36 Mo. 202; *Cuff v. Newark & N. Y. R. R. Co.*, 6 Vroom (N. J.), 17; *McCafferty v. Spuyten Duyvil & P. M. R. Co.*, 61 N. Y. 178; *King v. New York Central & H. R. R. Co.*, 66 N. Y. 181; *Steel v. South Eastern R. Co.*, 16 C. B. 550; *Reedie v. London & N. W. R. Co.*, 4 Exch. 244; *Hughes v. Cincinnati & S. R. Co.*, 15 Am. & Eng. R. R. Cas. 100.

Company Liable for Abuses in Contractor's Exercise of Power of Eminent Domain.—When, however, a contractor, in exercising the power of eminent domain vested in the company, exceeds or abuses his power, there are many cases which hold the company liable. In this respect the contractor is regarded as the servant or agent of the company. *Veazie v. Penobscot R. Co.*, 49 Me. 119; *Vermont Central R. R. Co. v. Baxter*, 22 Vt. 365; *Lesh v. Wabash Nav. Co.*, 14 Ill. 85; *Hinde v. Wabash Nav. Co.*, 15 Ill. 72; *Chicago, St. P. & F. R. Co. v. McCarthy*, 20 Ill. 385; *Chicago & R. I. R. Co. v. Whipple*, 22 Ill. 105; *West v. St. Louis, Terre Haute & V. R. Co.*, 63 Ill. 545; *Cairo & St. Louis R. Co. v. Woolsey*, 85 Ill. 370; *Macon & A. R. Co. v. Mayes*, 49 Ga. 355; *Houston & G. N. R. Co. v. Meador*, 50 Tex. 77; *Cunningham v. International R. Co.*, 51 Tex. 503; *Rockford, R. I. & St. L. R. Co. v. Wells*, 66 Ill. 321.

General Reference.—For a full collection of the authorities relative to the liability of a railroad company for the acts of a contractor, and upon the question who is and who is not to be deemed as exercising an independent employment, see *Hughes v. Cincinnati & Springfield R. Co.*, and note 15 Am. & Eng. R. R. Cas. 100.

MUSTER

v.

CHICAGO, M. & ST. P. RY. CO.

(*Advance Case, Wisconsin, November 6, 1884.*)

A railroad company is not responsible for the negligent acts of postal clerks or agents upon its trains.

The evidence showed that a mail-bag was thrown either from the mail car, express car, or baggage car on a train, by a person within the car. The bag

18 A. & E. R. Cas.—8.

could not lawfully have been in any other than the mail car, and no person other than a postal clerk or agent could lawfully enter such car, or throw the bag therefrom. *Held*, that in the absence of evidence to the contrary, it will be presumed that the bag was thrown from the mail car by a postal clerk or agent.

The mail-bag was usually thrown from the train about 200 feet west of the depot, and there was no evidence that it had ever been thrown off at the depot prior to the occasion in question. *Held*, that the railroad company was not chargeable with notice that it was likely to be thrown off at the depot, and hence was not bound to guard, by notice or otherwise, against an injury to one of its employes resulting from its being thrown off there.

The regulations of the post-office department do not require the speed of mail trains to be slackened at catch-stations, where cranes are erected for the exchange of mails.

The running of a mail train at the rate of thirty or thirty-five miles per hour past a station is not of itself unlawful; nor can negligence be imputed to the railroad company from that fact alone, so as to make it liable for an injury resulting from the throwing of a mail-bag from such train.

APPEAL from Circuit Court, Jefferson county.

Action to recover damages for personal injuries alleged to have been caused by the negligence of the defendant company. The plaintiff and one Roth were at work for the defendant, putting a cornice on its depot building at Tunnel City, or Greenfield, on its line of railway between Milwaukee and La Crosse. A scaffold had been erected on the south side of the depot—towards the main track—upon which they stood when at work on the cornice. It was agreed on the trial that the scaffold was substantially and safely built. On December 2, 1882, at 8:20 A. M., a passenger train of the defendant, running from Chicago and Milwaukee to La Crosse, designated as train No. 3, ran past the depot at Greenfield at a speed (variously estimated) of from twelve to thirty or thirty-five miles per hour. A United States mail car in charge of a postal clerk or agent, and from which all the employes of defendant operating the train were excluded by law, constituted a part of the train. The postal car was located between the tender of the locomotive and the first or leading passenger coach, as were also an express car and a baggage car. There were four coaches and three sleepers in the train. The train was behind her schedule time at Greenfield two hours and forty minutes. Greenfield was a flag station, but not a stopping place for train No. 3. As the train passed the depot on that morning, some object, which Roth (the only witness who testified on the subject) thought was a mail-bag, was thrown by some person from one of the cars between the tender and first passenger coach, against one of the upright supporters of the scaffold on which plaintiff was at work. It knocked the support from under the scaffold, by means whereof the staging on which the plaintiff stood, and the plaintiff with it, were precipitated to the platform below, whereby the plaintiff received the injuries complained of. For the purpose of receiving the mail at

Greenfield, the post-office department has caused to be erected a crane or mail-catcher about 200 feet west of the depot, from which mails were delivered into the postal car on train No. 3 without stopping the train or slackening its speed. The mail-bag for delivery at that point was usually thrown from the car near the mail-catcher. After the testimony was all in, the jury, by direction of the circuit judge, returned a verdict for the defendant. A motion for a new trial was denied, and judgment for the defendant was entered pursuant to the verdict. The plaintiff appeals from the judgment.

Harlow Pease, for appellant.

J. W. Carey and *D. S. Wegg*, for respondent.

LYON, J.—The learned counsel for the plaintiff maintained, in his argument, that there is no positive proof that the object thrown from the car was a mail-bag, or that it was thrown from the mail car, or that it was not thrown by one of the employes of the defendant company. From these premises he argued that the case is within the rule of *Kirst v. Milwaukee, L. S. & W. Ry. Co.*, 46 Wis. 489; and *Cummings v. National Furnace Co.*, 18 N. W. Rep. (Wis.) 742. That rule is thus stated by Erle, C. J., in *Scott v. London Dock Co.*, 3 Hurl. & C. 596: "There must be reasonable evidence of negligence; but where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care." The rule is sustained in numerous cases, many of which are cited in the brief of counsel for plaintiff.

The difficulty with the argument is in the premises upon which it is rested. The pleadings and proofs do not leave the cause of the accident in any doubt or uncertainty. The allegations of the complaint are that the defendant "carelessly and negligently discharged, unloaded, and ejected from one of the cars of said train, through an opening in the side of said car, a large mail-bag filled with heavy mail, which said mail-bag with its contents was, by the great velocity and momentum of said train, thrown against one of the supports of said scaffold, and thereby said support and a portion of said scaffold, on which the plaintiff was standing, were displaced and knocked down," etc. Aside from the alleged speed of the train (which will be hereafter considered), all of the testimony on the subject is in harmony with these averments. Hence, it is an established fact in the case that the support upon which the staging of the scaffold rested was knocked down by reason of a mail-bag filled with mail matter having been cast against it. It is in testimony and undisputed that such mail-bag was thrown from a

car between the tender and first passenger coach, through a side door, by a person within the car. The mail car had a side door, and was located in the train between the tender and such coach. No person other than the postal clerk or agent had any lawful right to enter such car; no mail matter could lawfully have been in any other car on the train; and no person other than such clerk or agent could lawfully discharge the mail-bag. Such is the law, and the evidence does not tend to show that the law was violated in any of these particulars in discharging the mail from the train when the plaintiff was injured. In absence of such proof, it must be presumed that the mail-bag was discharged from the postal car by an employé of the post-office department, and not of the railway company. Such being the presumption, there is no room for the application of the rule above stated.

We do not understand counsel as claiming that the railway company is liable for the negligent act of the postal employé, if it is otherwise free of negligence contributing to the injury of the plaintiff. Such a claim, if made, could not be sustained. The government compels the company to carry the mails, and designates the trains upon which the same shall be carried. It prescribes the kind of cars which shall be provided, and appoints clerks and agents to take exclusive charge of mails on the trains, and to receive and discharge the same. Such clerks and agents are paid by the government, and are answerable only to the government for the manner in which they shall discharge their duties. The railway companies upon whose trains such duties are performed have no control whatever over them, and it would be just as absurd to hold one of these companies responsible for the negligent acts of such government employés, which it had no means of preventing, as to hold the companies responsible for the negligent acts of passengers on their trains committed under like circumstances. We conclude that the mere act of the postal employé in throwing off the mail-bag at the depot, conceding it to have been a negligent act, was not negligence on the part of the railway company.

But it is maintained that the train was propelled past the depot where the plaintiff was injured at an unreasonable rate of speed, which contributed to the injury, and hence the defendant is liable for such injury, although not responsible for the mail-bag being thrown off at that point. It is probable that but for the momentum of the train the accident would not have happened. Yet it does not necessarily follow from this that the defendant is liable therefor. To render it liable some negligent or unlawful act on its part must be shown. It is said that the plaintiff did not know that this train passed the depot at such great speed; and, in view of the fact that the mail-bag might be thrown off there, and the scaffold on which he was at work thrown down thereby, the

railway company should have informed him of the peril, and was negligent because it did not. This point is not well taken. All the evidence on that subject is to the effect that the mail-bag was usually discharged near the mail-catcher, which was 200 feet west of the depot, and there is no testimony whatever that it had ever before been thrown off at the depot. The company is not chargeable with notice that it was likely to be thrown off at the depot, and hence was not required to guard, by notice or otherwise, against an accident to the plaintiff resulting from its being thrown off there on the occasion in question. But the principal ground upon which negligence is sought to be imputed to the defendant because of the speed of the train is found in the regulations of the post-office department on that subject.

Before proceeding to consider such regulations some observations will be made upon the testimony bearing upon the speed of the train. The plaintiff and Roth each thought the train ran by the depot at the rate of from thirty to thirty-five miles an hour. Roth testified that he first saw it when it whistled nearly eighty rods east of the depot. The plaintiff gives no distance. He merely says that he was not looking at it more than a minute or two. Neither of them says that he thought of the speed of the train at the time, or that he watched its progress with reference to the time occupied in passing the space between any objects the distance between which could be ascertained. Besides, the train was running almost directly towards them. The substance of their testimony is that the train was running fast. Their estimates of its precise velocity per hour are most unsatisfactory and unreliable. On the other hand, it appeared that the train ran on an ascending grade—the steepest on that line of railway—for more than two miles before it reached the Greenfield depot, and that the track on that grade is laid on reversed curves. The train was a heavy one, and there is some evidence that the track was not in a condition favorable to a high rate of speed. These conditions necessarily greatly retard the speed of the train, and strongly corroborate the testimony of the conductor and engineer to the effect that the train could not have been propelled up the grade past the depot at any high rate of speed. Their estimate of the speed of the train in question at that point is from ten to twelve miles per hour.

Giving proper weight to the above conditions, the existence of which are undisputed, it would be difficult to hold that the estimates of the plaintiff and Roth amount to anything more than a mere *scintilla* of evidence that the train was running thirty to thirty-five miles per hour. On the evidence in the case we should hesitate to sustain a special finding that it was running at that rate of speed. It would seem unreasonable to allow a verdict based entirely upon an opinion of a witness to stand when the uncontroverted facts proved demonstrate that the opinion is utterly

erroneous. The testimony relating to the speed of the train has been considered, not because it is material to the determination of the case, but because great stress was placed upon it in the arguments. For the purposes of the case it may be assumed that the plaintiff's estimate in that behalf is correct.

We will now consider the regulations of the post-office department which are relied upon to establish the alleged negligence or misconduct of the railway company. Only three of these need be set out. They are as follows: "(1) The department will provide for the delivery of mails to offices located within eighty rods or over that distance from points at which passenger trains or trains on which mails are carried do not make stops, or where there is a flag station, and at such points the companies will be required to slacken the speed of trains sufficiently to admit of the exchange of mails with safety. (2) Cranes and catcher pouches. For the purpose of exchanging mails at certain way and flag stations between the post-offices at these places and the railway offices without an abatement or loss of speed of the train, the post-office department has introduced the use of a mail-catcher, causing the erection at each of such stations of a crane on which the pouch to be exchanged by the postmasters is to be hung. (3) At catch stations where cranes are erected for the exchange of mails without slackening the speed of trains, the pouch must never be kicked off, but must be thrown off by hand to a distance of at least ten feet from the track, so as to prevent the pouch from being drawn under the train."

As already stated, a crane had been erected for the receiving of mails on the cars at Greenfield, which thereby became a catch station. It is conceded to be a flag station, although as a matter of fact it was not, so far as train No. 3 was concerned. That train did not stop there, and could not properly be flagged to do so. It was said in argument that there is no proof that the crane erected at that point was used; but this is an error. The proof is conclusive that it was in use. The conductor of train No. 3 testified that "there was and is now a crane at this station for the delivery of mail *for this train*." He then described the process of delivery from the crane into the car. The above regulations of the department are *in pari materia*, and must be construed together. So construed, their meaning and effect are perfectly plain. At stations where mail trains do not stop, and which are not catch stations, the speed of the train must be slackened to the point of safety in the exchange of the mails. At catch stations no slackening of the speed of the train is required.

It cannot be successfully maintained that a speed of thirty or thirty-five miles per hour through and past Greenfield station is of itself an unlawful rate of speed. This train No. 3 was the fastest train on that line of railway. Doubtless that was one reason why the de-

partment required the railway company to carry the mails on it. It is within the common knowledge and observation of men in general that fast mail and express trains on the great trunk lines of railway throughout the country are habitually and usually run at a much higher rate of speed; yet no one would impute negligence to the railway companies on that fact alone. To render such rate of speed unreasonable, some other circumstance or condition must be shown to exist, calling for a reduction of speed, a disregard of which would be inconsistent with reasonable care. We find no such condition in this case. The scaffold on which the plaintiff stood was built substantially and safely. The defendant was not chargeable with notice that the mail-bag was likely to be thrown off the car where the scaffold stood, and is not responsible for the results of the act of the postal employé in throwing it against the support of the scaffold. The regulations of the post-office department did not require the speed of the train to be slackened at that point; and the train was running at a lawful rate of speed. Under these circumstances we cannot doubt that the proofs fail entirely to convict the defendant of any negligence which contributed to the injuries complained of; and there was nothing to submit to the jury in that behalf. The direction by the judge to the jury to return a verdict for the defendant was correct.

Judgment affirmed.

PAYNE

v.

WESTERN, ETC., R. Co.

(*Advance Case, Tennessee, 1884.*)

It is not unlawful for a railroad company to discharge, nor to publish notice that it will discharge, its employés for trading with a certain merchant, unless thereby a contract between company and employés is broken; and even then no action accrues to the merchant unless the notice is libelous.

No action accrues to the merchant against the company or another for such notice, though it may be maliciously posted and operate to deter employés of the company and others from trading with plaintiff, and thus to destroy his business. An act not unlawful, done in a manner not unlawful, though from wicked and malicious motives, is not actionable.

THIS was an action of trespass on the case, brought by a merchant against a railroad company and its general agent. The declaration alleged that "defendants wickedly, unlawfully, fraudulently and maliciously conspired and confederated together, out of malice, ill-will and wicked feeling, to injure, damage and ruin

plaintiff in his business ; and to that end and with that purpose made, published and circulated the following scandalous and injurious order, threat, command and paper writing :

“ ‘ J. T. Robinson, yard master :

“ ‘ Any employé of this company, who trades with F. Payne from this date, will be discharged. Notify all in your department.

“ ‘ J. C. Anderson, agent.’

“ Like orders and commands were published and addressed to other heads of departments of said railroad, and were posted and published by defendants, and read and commented upon by the public along the line of the railroad, and by plaintiff’s customers and patrons. And by reason of these orders and commands, plaintiff was brought into reproach, disrepute, suspicion and distrust, and plaintiff’s business was injured, ruined and destroyed, etc.”

There was a demurrer assigning, *inter alia*, the following causes :

“ 1. Defendants had the right to discharge employés because they traded with plaintiff, or for any other cause ; and for any wrong in so doing defendants would be liable only to the employés so discharged.

“ 2. The company cannot be held liable for the wrongful act of its agent, Anderson.”

The circuit judge allowed the demurrer, and plaintiff appealed in error.

George W. White, for plaintiff in error.

Thos. H. Cooke, for defendant in error.

INGERSOLL, S. J.—The suit is not maintainable as an action of libel or slander, either to personal character or business reputation. It must stand, if at all, upon the alleged malicious and unlawful conspiracy and combination of defendants, for the purpose and with the effect of depriving plaintiff of his customers, and thus oppressing, injuring and ruining him in his trade. This, rather than libel or slander, is the particular wrong relied upon by plaintiff. As concisely put by his counsel in argument :

“ We have brought a suit to recover damages because defendants, by threats and intimidations, prevented people from trading at our store. Plaintiff was pursuing a lawful business ; defendants, out of malice and ill-will towards him, by means of threats and intimidation, drove his customers from him and ruined his business ; every malicious act is wrongful in itself, and if it cause hurt to another, it is a tort and is actionable.”

To this forcible statement of plaintiff’s case, defendant’s answer, in effect, is : “ We have a right to employ or not employ when and whom we choose. We may discharge our employés, all or singly, whenever we wish ; with reason or without reason ; because

they trade with plaintiff or do not trade with him ; and if the employé is wronged thereby, he may sue, but plaintiff cannot. It is purely a matter of contract between the company and its employés ; and if a contract has been broken, only a party to the contract, or one in privity, can sue for its breach. Plaintiff shows no such privity, and cannot maintain this action unless defendants have done some unlawful act which caused the injury complained of ; the act complained of is the notice to the hands that they will be discharged if they trade at plaintiff's store. The discharge of an employé is merely the exercise of an undoubted right, and cannot give plaintiff a right of action, even though the act was maliciously done, and plaintiff suffered injury therefrom. *Motive* does not furnish ground for civil action ; wrongful *acts* alone are actionable. Conspiracy does not become actionable till some unlawful act is done under it ; and the act alleged here is not unlawful but permissible."

Plaintiff, in reply to this, besides asserting the correctness of his original position, denies that the defendant company had the right to discharge, or to threaten to discharge, employés for trading with him, because the concession of such authority, and its exercise by strong corporations and large manufacturing firms, would unfairly defeat and destroy competition, and tend to create monopoly in trade ; whereas the law should discourage the latter and foster the former. Plaintiff also insists that, while our decisions furnish no precedent for his suit, and we have no statute upon the subject, the cases cited by Mr. Addison in his work on Torts, Vol. I., Sec. 1, afford abundant authority for this action.

The novelty, interest and importance of the questions demand a careful examination of the cases and the principle involved. The case turns upon the common law. The first question is : Is it unlawful for a person, or any number of persons in combination, to threaten to discharge employés if they trade with a certain merchant ? Would it be unlawful to discharge them for such reason ? If not, surely it would not be unlawful to " threaten " it.

If the employés are engaged for fixed terms, it may be assumed that a discharge by the employer for such a reason would be unwarranted, and would give the employés a right of action for breach of contract. But no one else except a privy could complain of the breach of contract ; and the ground of the employé's action would be the refusal of the employer to pay him for the period promised in the contract of service. If the service is terminable at the option of either party, it is plain no action would lie, even in favor of employé, for either party may terminate the services for any cause, good or bad, or without cause, and the other cannot complain in law. Much less could a stranger complain. No action would accrue, either to employé or stranger, for breach of contract ; for no contract is broken.

If the act is unlawful, it must be on other grounds than breach of contract; as, that it unjustly deprives plaintiff of customers and trade to which his fair dealing entitles him, and thus destroys his business. For any one to do this without cause, is censurable and unjust. But is it legally wrong? Is it unlawful? May I not refuse to trade with anyone? May I not forbid my family to trade with anyone? May I not dismiss my domestic servant for dealing, or even visiting, where I forbid? And, if my domestic, why not my farm hand or teamster? And if one of them, why not all four, why not a hundred or a thousand of them? The principle is not changed or affected by the number. And if it were, who should say how many it would be lawful and how many unlawful to forbid? Nor can it be better determined by effect than by number. To keep away one customer might not perceptibly affect the merchant's trade; deprived of a hundred of them, he might fail in business. On the contrary, my own dealings may be so important that, if I cease to trade with him, he must close his doors. Shall my act in keeping away a hundred of my employes be unlawful because it breaks up the merchant's business, and yet it be lawful for me to accomplish the same result by withholding my own business? Obviously the law can adopt and maintain no such standard for judging human conduct; and men must be left, without interference, to buy and sell where they please, and to discharge and retain employes at will, for good cause, or no cause, or even for bad cause, without thereby being guilty of an act, unlawful *per se*. It is a right which an employe may exercise in the same way, to the same extent, for the same cause or want of cause, as the employer. He may refuse employment from a man or company that trades with an obnoxious person, or does other things which he dislikes. He may persuade his fellows, and the employer may lose all his hands and be compelled to close his doors; or the employer may yield to the servant's demand and withdraw his custom or cease his dealings; and the obnoxious person be thus injured or wrecked in business. Can it be pretended that for this either of the injured parties has a right of action against the employes? Great loss may result, indeed has often resulted, from such conduct; but loss alone gives no right of action. Great corporations, strong associations and wealthy individuals may thus do great mischief and wrong; may make and break merchants at will; may crush out competition, limit employment, and foster monopolies, and thus greatly injure individuals and the public; but power is inherent in size and strength, numbers and wealth, and the law cannot set bound to it unless it is exercised illegally. Then it is restrained because of its illegality, not because of its quantity. The great and rich and powerful are guaranteed the same liberty and privileges as the poor and weak. All may buy and sell where they choose; they may employ, re-

fuse to employ or dismiss whom they choose, without being thereby guilty of legal wrong, though it may seriously injure or even ruin others. Railroad corporations have in this matter the same right enjoyed by manufacturers, merchants, lawyers and farmers. All may dismiss their employes at will, be they many or few, for good cause, for no cause, or even for cause morally wrong, without being thereby guilty of legal wrong. *A fortiori*, they may "threaten" to discharge them without thereby doing an act illegal *per se*. The sufficient and conclusive answer to the many plausible arguments to the contrary, portraying the evils to workmen and to others from the exercise of such power by the great and strong, is: *They have the right to discharge their employes, The law cannot compel them to employ workmen, or to keep them employed.* If they break contracts with workmen, they are answerable only to them. If, in the act of discharging them, they break no contract, no one can sue for the loss suffered therefrom. Trade is free; so is employment. The law leaves employer and employe to make their own contracts; and these, when made, it will enforce; beyond this it does not go. Either employer or employe may terminate the relation at will, and the law will not interfere except for contract broken. This secures to all civil and industrial liberty. A contrary rule would lead to a judicial tyranny as arbitrary and intolerable as that exercised by Scraggs and Jeffreys.

But plaintiff says that the defendants *wickedly and maliciously combined and confederated* for the purpose of causing, by means of threats and intimidation, plaintiff's customers to leave off trading with him; and the unlawful purpose was accomplished by these means; and thus plaintiff's business was ruined and he caused to suffer great pecuniary loss; and he urges that defendants are liable in damages therefor, because *every act done fraudulently and maliciously*, and with the effect of injuring another in his business, gives good cause of action. If defendants, by means of "threats and intimidations," have driven away plaintiff's customers and thus destroyed his trade, they have injured him by an unlawful act, and are liable to him in damages, whether they did it wickedly and maliciously or not. For it is unlawful to threaten and intimidate one's customers, and the loss of trade is the natural and proximate result of such acts. But "threats" and "intimidation" must be taken in their legal sense. In law a threat is a declaration of intention or determination to injure another by the commission of some *unlawful* act; and an intimidation is the act of making one timid or fearful by such declaration. If the act intended to be done is *not unlawful*, the declaration is not a threat in law; and the effect thereof is not intimidation in a legal sense. So, too, of the alleged conspiracy. A conspiracy is an agreement between two or more persons to do an *unlawful* act.

If the act to be done is not unlawful, then the agreement or combination is not a conspiracy. The question then is: What were the acts done, or intended or agreed to be done, by which the trading was prevented?

In the second count, which plaintiff specially relies upon to sustain this view of his case, after charging generally the use of threats and intimidations, he specifies as follows: "The said defendants threatened, among other things, to discharge any man in the employ of said railroad company who should trade with plaintiff, and this threat was published," etc. This is the only "threat or intimidation" specified. But this act was not unlawful, as we have seen; and to denounce a determination to do it was not "threat" or "intimidation" in a legal sense. From this it is fairly inferable that, in this count as in the first, though plaintiff uses the general terms "unlawful and malicious threats," he refers to the so-called "threat" to discharge employes, and rests his case upon it. Presumably he has particularized the most wrongful act; or, at the most, the other "unlawful and malicious acts" are of the same and no worse character. This act, plaintiff says, was done by defendants *wickedly and maliciously*, with the intent and effect of breaking up his business.

The question then is: Is an act, not unlawful, rendered actionable to the one suffering injury therefrom because it is committed wilfully, wickedly and maliciously, and in pursuance of a conspiracy to inflict the injury suffered? Does one render himself liable in damages for maliciously and wickedly exercising his rights, or denouncing his intention of so doing, if thereby he injures another?

The cases relied on by plaintiff, cited by Mr. Addison in his work on Torts, Secs. 20, 22—where tenants were driven from their holdings, scholars frightened from school, persons prevented from trading at one's store or with a vessel, buyers and workmen driven from a quarry—do not serve as precedents, for the reason that in all of them the defendants either committed or threatened unlawful acts. In most of them violence was used or threatened; in some statutory misdemeanors were committed; in others fraud, duress or libel was resorted to. This relieved the cases of the difficulty and doubt which exists in this, where there is no libel, violence or broken statute. In Sec. 40, however, Addison declares broadly that "every malicious act is wrongful in itself in the eye of the law, and if it causes hurt or damage to another, it is a tort, and may be made the foundation of an action." Upon this plaintiff relies; and if this broad statement contains a correct exposition of the law, he is right, and the demurrer should be overruled; for the declaration abounds in charges of malice and wrong. But is this the law?

To answer correctly, it must first be understood what is meant

by "*malicious act*." In common parlance it is an act proceeding from hatred or ill-will; or dictated by malice; or done with wicked intentions or motives. But surely this cannot be the sense in which the phrase is employed by Addison; for if it were, my neighbor would be liable to me if, from ill-will or wicked motive, he refused to let me get water at his spring; or made a road for myself through his farm; or locked his pump or his gate against me; or built his store or shop or a high fence on his own land in such close proximity to my windows as to exclude light and view.

It is unreasonable that actions should be maintained for any of these things. For though my neighbor is causing me hurt, and that too from wicked motives, and is violating the moral law, he is only exercising his undoubted right to use his own for himself and deny me all privilege in it; and this the law does not punish, as has often been ruled in courts of the highest character. *Story v. Odin*, 12 Mass. 157; *Mahan v. Brown*, 13 Wend., 261; *A. & C. P. R. Co. v. Douglass*, 5 Seld. 447; *Lasala v. Holbrook*, 4 Paige, 169; *Thurston v. Hancock*, 12 Mass. 220. Judge Cooley, in his works on Torts, p. 278, says: "It is a part of every man's civil rights that he be at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason or is the result of whim, caprice, prejudice or malice. With his reasons neither the public nor third persons have any legal concern." And again at p. 688: "The exercise by one of his legal right cannot be a legal wrong to another. * * * Whatever one has a right to do another can have no right to complain of." This he considers a mere truism.

Baron Parke said in *Stevenson v. Newham*, 13 C. B. 285: "An act which does not amount to a legal injury cannot be actionable because it is done with a bad intent." And Judge Black in *Jenkins v. Fowler*, 24 Pa. St. 308, declares: "Any transaction which would be lawful and proper if the parties were friendly cannot be made the basis of an action merely because they happen to be enemies. As long as a man keeps himself within the law by doing no act which violates it, we must leave his motives to Him who searches the heart." Judge Cooper, in accordance with these views, has declared in *Macy v. Childress*, 2 Tenn. Chap. 442: "It is no defense to a legal demand, instituted in the manner prescribed by law, that the plaintiff is actuated by improper motives. The motive of a suitor cannot be inquired into. Were it otherwise, nearly every suit would degenerate into a wrangle over motives and feelings."

The question was ably argued and received elaborate consideration in the Supreme Court of Maine, in the recent cases of *Heywood v. Tilson*, 46 Am. Rep. 373, wherein it was decided, without dissent, that no action lies by the owner of a house against one who maliciously refuses to employ any tenant of such house and

thus prevents the renting. It would be unendurable if our courts of law should be perverted to the trial of the motives of men who confessedly had done no unlawful act.

Upon both reason and authority, therefore, it is clear that the phrase, "malicious act," cannot be used by Mr. Addison in this connection in the popular signification, or if so used by him, it is not a correct statement of the law.

In another sense it is correct. Prof. Greenleaf, in his 2d volume on Evidence, Sec. 453 (2), thus defines a malicious act: "In a legal sense any unlawful act, done wilfully and purposely to the injury of another, is, as against that person, malicious." To determine, then, whether a malicious act is wrongful in the legal sense, and therefore actionable, we must first determine whether it is unlawful. But if it is unlawful and injurious, it is actionable irrespective of the motive; and whether malicious or not, if not unlawful and injurious, it is not actionable.

Plaintiff appeals with confidence to the legal maxim: There is no wrong without its remedy. Far be it from us to shake the public and professional confidence in this venerable maxim of the English common law; but, as it is a legal maxim, it must be taken in a legal sense. So taken, obviously, it can mean no more than that there is a legal remedy for every legal wrong: *i. e.*, for every injury suffered from the effect of an unlawful act, or a lawful act done in an unlawful manner.

Neither is shown here. Defendants have merely warned their employes not to trade with plaintiff, or if they do, they must give up their employment. They had the right to discharge them on this ground; it was not wrong, but highly proper, to give the employes notice of the intention of the company. The manner of giving the warning was not unlawful. The posted notice contained no word of libel or reproach upon the character of plaintiff; no charge or insinuation that he was unfair in his dealings. Omitting any attack on plaintiff's character as a man or trader, defendants, in the usual manner, told its employes to quit trading with plaintiff, or to quit working for them. The common law does not forbid such an act, nor has it been made unlawful by statute, as in some of the States, and probably in England. No legal wrong has been done; therefore there is no legal remedy. Courts administering the civil law cannot punish sin or wickedness unless it be committed in violation of the civil law, which is the measure of their jurisdiction. Nor will the maxim, *Sic utere tuo ut alienum non lædas*, aid the plaintiff in his contention. As commonly translated, "So use your own as not to injure another's," it is doubtless an orthodox moral precept; and in the law too it finds frequent application to the use of surface and running water, and generally to easements and servitudes. But strictly even then it can mean only, "So use your own that you do no legal

damage to another's." Legal damage, actionable injury, results only from an unlawful act. As paraphrased, the maxim means no more than, "Thou shalt not interfere with the legal rights of another by the commission of an unlawful act."

A majority of the court, therefore, conclude that the act *done*—*i. e.*, the publication of the notice that the company would discharge employes who traded with plaintiff—was not an unlawful act nor an unlawful threat; was not a libel; and, though done wickedly and maliciously, is still not actionable, because it was not an unlawful act nor done in an unlawful manner.

The judgment of the circuit court will be affirmed.

Judgment affirmed.

STATE OF SOUTH CAROLINA

v.

HATHCOCK.

(20 South Carolina Reports, 419.)

Laborers employed in working upon the road-bed of a railroad company, which was engaged in carrying freight, passengers and mail, were summoned to work upon the public highways, but failed to appear. Upon being prosecuted for such failure, they interposed their daily and constant employment at that time as a justifiable excuse, which defense was, however, overruled by trial justice and circuit judge. *Held* that, there being no definition of what was a justifiable excuse in such cases, this court could not declare the ruling below to be error of law.

THESE were prosecutions against Oliver Hathcock, Walter Kelly, George McConnell, James McConnell, and Rhett Jordan—five cases heard together, the same point being involved in all. In dismissing the appeal to the circuit court, the presiding judge said:

The defendants were convicted and sentenced to pay each a fine of five dollars, or be imprisoned ten days in the county jail. The defendants appeal on the grounds: 1. That their employment, as above stated, in the service of the railroad company is a "justifiable excuse." 2. That, being so employed, they are not liable to road duty.

These defendants are not the employes of the Government, either State or Federal. They have no claim on the Government, and are in no way responsible to it. They are employed and, I take it, paid, and can be dismissed by the railroad company at its pleasure. Except that they are paid for the time they work and not by the job, there is no difference between them and those who get out cross-ties, bridge and trestle timber, and fire-woodsee I.

nothing in the nature of their connection with the railroad company which exempts them from road duty. They are not exempt by statute as a class.

What is a justifiable excuse is not defined in the acts. I think, however, that it must be something in the nature of an emergency, which cannot, with reasonable care, be provided against, as sickness or death in one's family, or even of a near neighbor or friend, where the common interests of humanity demand that business shall be laid aside for the care of the sick and dying. Some heavy loss from fire or flood might be sufficient to excuse the sufferer during the temporary pressure on him. I take it that any sudden and unexpected demand on the railroad company to repair damages from a freshet, or some accident on the railroad, might excuse the railroad hands. There is nothing of the sort in this case—nothing which could not have been provided for. The railroad company only employed hands enough to do their work, while it would have been easy to have employed sufficient force to do its work, making proper allowance for that which the State demands. I do not think that any class of persons not named as exempt in the act can plead their employment or occupation as *ipso facto* a valid or justifiable excuse for failure to do road duty.

The judgment of the trial justice in these cases is therefore confirmed.

The defendants' exception to this judgment was as follows:

For that his honor did not hold that while a track hand was working upon the track of a railroad, then in operation, at a time when his so working was necessary for the safe transportation of merchandise, passengers and the United States mail, his being so employed constituted a "justifiable excuse" for not working upon the dirt highways of the State at that time.

J. H. Rion, for appellant.

Solicitor Gaston, contra.

SIMPSON, C. J.—The defendants were employed by the Charlotte, Columbia & Augusta Railroad Company to work on the road-bed of said railroad, and it is said "that they were engaged on said work every day in the year, Sundays excepted, constantly employed in keeping said road-bed in condition, and that no more hands were employed than necessary for this purpose." While thus employed, they were warned to work on a public highway near by. This notice they disregarded, and failed to appear. Being indicted before a trial justice, they interposed the defense of "justifiable excuse," founded upon the facts above stated.

The act under which the defendants were indicted is found in general statutes, Sec. 1085. It provides, "that if any person of legal age shall neglect to appear, or shall refuse to work upon the highways or roads (having no justifiable excuse), according to the

directions of the overseer, he shall be deemed guilty of a misdemeanor," etc. The defense thus interposed was overruled by the trial justice, and also by the circuit judge upon appeal to the circuit court. The appeal here raises the question again, Should the facts, as stated, have been held to constitute a justifiable excuse?

The act, as it will be seen, provides that a justifiable excuse in such cases will prevent conviction, but it nowhere defines or declares what is meant by the term "justifiable excuse;" nor have we ever been able to find any case where a principle has been established by which the meaning of these terms can be determined as matter of law. Cheves, 94, 210. The cases relied on by the respondent, found in Cheves' reports, do not touch this question. The first case decides that railroad hands are not exempt from highway duty, and the second that postmasters are not exempt. The question here, however, is not whether the defendants were exempt, but whether, being otherwise liable to do road duty, they could be excused in this instance on the ground that their employment as railroad hands constituted a justifiable excuse.

It is the province of this court, under the constitution, to correct errors of law in cases at law brought before it by appeal. The difficulty in this case is, that we find no law, either statutory or otherwise, declaring what facts will constitute a justifiable excuse in cases like these, and consequently we have no rule by which to test the facts relied on by the appellants, and to determine whether or not, as matter of law, they make out a justifiable excuse. In the absence of such rule, whatever might be our individual opinions as to the sufficiency of the excuse, as a matter of justice or expediency, yet we cannot say that the court erred as matter of law in disregarding it. The legislature, in failing to define, either generally or specifically, what facts in law would amount to a justifiable excuse, seems to have left this matter to the judgment and discretion of the tribunal before which the parties might be brought, and such being the fact, it does not appear that any question of law can be involved except that the accused has the right to interpose such a defense. If the court below had held that the defendants had no right to rely upon a "justifiable excuse" as a defense, this would have been in direct conflict with the act, and would have been error of law, subject to correction by this court; but, holding that a certain state of facts did not constitute this excuse, we fail to see what principle of law he disregarded.

It is urged by the appellants' counsel that this is a criminal case, and hence "a different construction as to what will be a justifiable excuse must obtain from what would be construed such excuse in a civil action for a penalty." This may be so, and yet the difficulty still remains. We are considering the question

whether the circuit judge committed error of law in his ruling, and we cannot say that such error exists until we find some law defining the term "justifiable excuse," and none has been referred to as applicable either to a civil or criminal case.

It is said that railroads are public highways; that they carry the mails, which is a great public duty; and that hands employed by them to keep the road-bed in repair, for the safe transportation of the mails and the goods and the merchandise of the people, are employed in a great public work; that they stand like the governor, the judges and other State officers while in the discharge of their official duties, and therefore should not be disturbed. We do not think that defendants occupy the position claimed for them. The railroads may in some sense be highways, but hands employed in keeping these roads in repair, by contract and under wages, are not giving their labor to the public under the road law, as other citizens are required to do. Neither are they public officials. On the contrary, they are ordinary employes, engaged in work of an important character, it is true; but a work, so far as they are concerned, entirely of a private nature and for their own individual profit—not differing from any ordinary employment, on the farm or workshop. But, be that as it may, the question again recurs, Where is the law which holds that even a public officer could interpose his public duties as a justifiable excuse under this act if he is otherwise liable? No doubt, in the case of a public officer, discharging important public duties, such a defense would avail; but if it was disregarded in reference to one not exempted by the road law when properly construed, could this court hold that it was legal error? We think not, except by judicial legislation. See *Harrington's Case*, 2 McCord, 401; *Martindale's Case*, 1 Bailey, 168, 170.

It is the judgment of this court that the judgment of the circuit court be affirmed.

Analogous Case.—In *Hawkins v. Small*, 9 Am. & Eng. R. R. Cas. 432, it was held that a section hand on a railroad was, under the peculiar terms of the railroad company's charter, exempt from duty on the public roads.

PATTERSON

v.

WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY.

(*Advance Case, Michigan, June 11, 1884.*)

One who is injured by the wrongful or negligent act of several persons can sue them jointly or severally, as he pleases.

The maxim *Sic utere tuo alienum non ledas* applies to a railway com-

party that has a right of passage over the track of another, and binds it so to use its right as not, by negligence, to injure others having like rights.

A railway passenger traveling over a leased track has no contract relations with any other lessee of the track than the company that carries him; and if he is injured in consequence of the negligence of some other lessee in its use of the track, his only remedy is by an action in tort for the latter's breach of the duty it owes him to so use it as not to injure him.

Depositions in Michigan have no validity unless the terms of the statute under which they are taken (Howell's Stat., Sec. 7461) are substantially followed or expressly waived; and under the implications of the statute and of uniform practice the name of the witness to be examined must be correctly given in the notice that the deposition will be taken. The examination of James Horan is not authorized by a notice that the deposition of Patrick Horan will be taken; and James Horan's deposition would be inadmissible.

The facts making it necessary to take a deposition are not required by statute to be set forth in an affidavit served upon the adverse party; it is enough if they are given in the notice to him that such deposition will be taken. But before a deposition can be put in evidence it must be shown to the court that some one of the statutory reasons exists for taking it; and the affidavit would be *prima facie* proof thereof where the practice is to serve it.

After a railway accident caused by a misplaced switch, a person purporting to be a brakeman declared that he caused it, and that he had opened the switch. *Held*, that evidence of this declaration would be no better than hearsay as to the fact about the switch.

A brakeman's admission that he caused a railway accident is inadmissible as *res gestæ* in an action arising therefrom against the company by which he is employed, if his statement was not made in the execution of his duty, or while the act to which it referred was in progress; nor can it bind the company as the admission of an agent if it does not appear that the act done was in the line of his duty.

ERROR to Wayne.

Case. Defendant brings error. Reversed.

Alfred Russell, for appellant.

Atkinson & Atkinson, and *Isaac Marston*, for appellee.

CHAMPLIN, J.—Plaintiff brought suit against defendant, and alleged in his declaration that "on or about the 27th day of March, 1883, the plaintiff was proceeding on a train of cars running from Toledo, Ohio, to Columbus, Ohio, on the Columbus, Hocking Valley & Toledo Railway, and was a regular passenger upon said train; and said train had reached a point at East Toledo where from the main line on which it was proceeding there branched off a side line running up the east branch of the Maumee river, upon which branch line the said defendant was moving a train of cars; and it was the duty of the said defendant to stop its said train at said point, and to await orders, and not to open the switch there until it had received the order, nor until the said train had passed on which the said plaintiff was being carried; and it was further its duty to have a safe and convenient switch at said point, and to have a switchman there, so that said switch would not be opened while said train was passing on which this plaintiff was being car-

ried; and to have such a switch that, if opened, those running said train could perceive it and arrest said train in time; yet the said defendants so negligently and unskillfully conducted themselves in and about the management of their said train, and of the said side track and switch, that they had at that point a switch of an old, disused and dangerous pattern, and so constructed that the approaching train could not readily perceive when the same was opened; that they had no regular attendant upon said switch; that they did not arrest their said train and wait for orders before entering upon the track which was being used by the said train on which said plaintiff was being carried, nor wait until the said train had passed, but negligently and carelessly and without fault on the part of this plaintiff opened the said switch and prepared to carry their train from said branch track on to the track over which plaintiff was approaching, and then and there caused plaintiff's train to leave the track on which it was running and enter on said branch or side track, and precipitated the same upon the train of the said defendant, whereby the said trains were brought together with great force and violence, and the said plaintiff received the injury complained of.

It appeared in evidence on the trial of the cause, that on the 25th day of March, 1882, the plaintiff bought a ticket at Toledo, Ohio, for a passage over the Columbus, Hocking Valley & Toledo Railway Company, from Toledo to Columbus, and entered the train about five o'clock in the morning, which started at that time for Columbus. It appeared from other testimony in the case that the track upon which the car in which the plaintiff was being conveyed ran was owned by the Pennsylvania Railway Company, and that the Columbus, Hocking Valley & Toledo Railway Company was operated by the Pennsylvania Company for five miles out of Toledo; and that at East Toledo, and within the corporate limits of the city of Toledo, and about one mile east of the place from which the coach containing the plaintiff started, there was a branch track and a switch at the junction of the two tracks, and that the branch track, and the switch, as well as the main track, were the property of the Pennsylvania Company. That the Pennsylvania Company maintained the switch, and had an employé whose duty it was to place lights upon it at night and remove them in the morning; that when said switch was closed a white light was shown up and down the main track each way, and that when it was opened two red lights were caused to be shown up and down the main track each way by the act of opening. It also appeared that at the junction of the branch and main tracks there was a telegraph office owned by the Pennsylvania Company, and in it a telegraph operator who was the servant of the Pennsylvania Company, and whose duty it was to see that said light was kept burning at night. It further appeared that the defendant

company, by arrangement with the Pennsylvania Company, had the right to run its freight trains over the said branch track upon the main track at said switch, and thence over the main line, a distance of about one mile from East Toledo into the Pennsylvania yards at Toledo, upon payment of a toll of one dollar per loaded car.

It appeared that the train in which the plaintiff was conveyed left Toledo while it was yet dark, and on the main track; and that the defendant's freight train was waiting on the branch track; and that the conductor of said freight train, having a key to the said switch in his pocket, which key had been furnished him by the Pennsylvania Company, was inside the telegraph operator's office waiting to receive orders to enter Toledo. That the custom was for the train desiring to use said switch and to pass upon the main track to open said switch, and that by the rules and practice of the defendant company the brakeman of the freight train had no authority to open said switch until directed so to do by the conductor of the freight train and until furnished by him with the key to the switch; but the brakeman did sometimes open the switch without orders when it was found unlocked. It appeared that the engine near the train in which the plaintiff was conveyed was proceeding at the rate of from fifteen to eighteen miles an hour, and that as he came near the switch, about six minutes after leaving Toledo, he saw that there was no light on the switch, and he also saw the freight train of the defendant, and the head light of the engine of said freight train standing still upon the branch track.

Certain rules of the Pennsylvania Company were put in evidence, from which the defendant claimed that it was the duty of said engineer to have halted until he could ascertain with certainty whether or not the switch was open, there being no light upon it. That said engineer, however, did not halt, and the switch being open the train conveying the plaintiff passed off the main track and upon the branch track, and collided with the defendant's freight train standing still upon said branch track. The defendant also put in evidence rules of the Pennsylvania Company in regard to lights and speed. The copies of the rules read in evidence are given in the margin.*

* RULES.

"Where any train does not stop at any point where another train is to be met or passed, the speed of the former must be reduced in passing switches to ten miles per hour, and extra watchfulness must be used to see that all is safe. If not absolutely sure the switches are right and everything safe, a complete stop must be made. When any train, whether passenger, freight or extra, is on a siding for a passenger train to meet or pass them after dark, a light must be shown if practicable at each main track switch, giving the proper signal that all is right. In any case the light must be shown at the switch in the direction from which the passenger train is approaching, and in such case special effort must be made to make sure that all is safe at all main track switches."

"None but properly authorized employes of the company shall be permitted to attend switches. Those in charge of trains must give men who are attending switches ample

The engineer of the plaintiff's train, on cross-examination, testified as follows:

Q. If there had been a light there to indicate that the switch was open, the accident would not have occurred, would it?

A. No, I don't think the collision would have occurred.

Q. If you had come to a dead stop and stood until you had found out how the switch was, there would have been no collision?

A. There would not be apt to be a collision if I stood still; but I supposed the switch was right.

It further appeared that the switch was allowed to remain unlocked nearly half the time; that the engineer above mentioned about forty minutes before the collision had backed his engine upon the main track and passed this switch in going into Toledo to make up his train in the Pennsylvania yard, and that the switch was closed then; that the switch was called a Wharton switch, and that an engine passing over it into Toledo would not if the switch were open leave the track, although an engine passing out of Toledo would, if the switch were open, leave the track and pass upon the branch track.

The first question I shall consider is whether the evidence discloses such a state of facts as would render the defendant liable, assuming that it was through the negligence of one of its brakemen that the collision occurred. It is unnecessary to decide whether under the testimony in this case the plaintiff could have maintained an action against the Columbus, Hocking Valley & Toledo Railway Company, founded on his contract relations with that company; or waiving that, he could have maintained an action on the case against such company based on its negligence in so running its train in disregard of the rules governing it for the safe conveyance of its passengers as to precipitate its train against the train of the defendant, whereby he was injured; or whether he could have brought his action against the Pennsylvania Railway Company founded on its duty to keep its railroad and switches in good and safe condition for the transporta-

time to throw and fasten the same properly, and must never attempt to use said switches without proper signals to do so from men attending them. If necessary trains must absolutely stop and wait for such signals."

"The absence of proper signals at switches or crossings where usually shown indicates possible danger and requires engine men to halt and ascertain that all is right."

"The absolute general rule for all switches when not in actual use is that they must be set for the main track and locked."

"They must not rely upon air brakes in approaching railroad crossings, or meeting points where there is a possibility of striking other trains or other specially dangerous points, but must reduce speed and approach such points under full control."

"They will approach stations, switches and road crossings watchfully, and strictly observe the rules relative to signals."

"Engine men are required to observe the position of all switches, and if there be levers, targets or lights, to see that they indicate that switches are properly adjusted. They must know, so far as it is possible for them to do so, that switches are right before attempting to pass or use them. If wrong, the engine or train must if possible be stopped at once."

"The position of targets at night will be shown by two red lights."

tion of passengers over its road, and its negligent breach thereof. In most cases of tort the plaintiff has a choice of remedies, and where there is more than one party guilty of the wrongful or negligent act which caused the injury he has the right to proceed against them jointly or severally, as he may choose. There existed no contract relations between plaintiff and defendant, and the only foundation for a right of action against it must rest upon some breach of duty which defendant owed to plaintiff. The defendant, having a right to use the track of the Pennsylvania Railway Company to pass its trains from the branch track to Toledo, undoubtedly owed a duty to other parties having a like right of passage to so use it as not to cause injury to others through the negligence of defendant. The maxim *Sic utere tuo alienum non laedas* applies to such a case, and if the defendant did by its negligent act open the switch, and thus cause the collision by which the plaintiff was injured, defendant must respond in damages.

The court below charged the jury that he would submit to them the real question which in the judgment of the court was at issue: whether the employes of the defendant engaged within the scope of their duty opened or left open the switch negligently, by which the accident occurred, and if the jury should so find, then the plaintiff would be entitled to a recovery. The jury, having found a verdict for the plaintiff, must have found that the employes of defendant, acting within the scope of their duty, negligently opened or left open the switch, and unless such fact was established by testimony that ought to have been excluded from the consideration of the jury their verdict must stand.

The deposition of James Horan was received in evidence against the defendant's objection, viz.:

First, because the notice does not state under what statute the deposition is taken, nor does the magistrate return what statute he proceeds under. *Second*, because no affidavit was filed and served upon the defendant showing the circumstances and facts required by the statute for the taking of the deposition. *Third*, because the notice was to take the testimony of Patrick Horan and the testimony of James Horan was taken instead, and the objection was entered in season before the deposition of James Horan was reduced to writing, the defendant having appeared specially to take the objection, and not having cross-examined. *Fourth*, because the deposition was not filed until about three months after it was taken, as appears from the entry of the clerk on the back; and *Fifth*, because no notice of the filing of the deposition was given to the defendant, and the defendant was authorized to believe the deposition had been abandoned.

The deposition, notice of taking proof of service and officers' return are annexed to the record and made a part thereof. The notice served (omitting the title of the court and cause) reads as follows:

"Please to take notice that on Friday next, the 21st day of September, 1883, at 11 o'clock in the forenoon, Patrick Horan will be examined as a witness on the part of the plaintiff in this cause, before Patrick McKernan, Esq., Circuit Court Commissioner for the County of Washtenaw, at his office in the City of Ann Arbor, in said County, at which time and place you are at liberty to appear before the said Commissioner and put such interrogatories to the said witness as you may think fit.

"ATKINSON & ATKINSON,
Plaintiff's Attorneys.

"To ALFRED RUSSELL, Esq.,
Defendant's Attorney."

Proof by affidavit of service of a true copy on the 15th day of September, 1883, is annexed to the notice.

It will be observed that the notice gives no place of residence of the witness to be examined, and states no cause for taking thereof. In the caption of the depositions the officer states that they are taken "pursuant to the notice hereunto annexed, and for the reasons therein stated." The law (How. Stat. Sec. 7468) requires the person taking the deposition to annex thereto a certificate of the time and manner of taking it, the person at whose request, and the cause or suit for which it was taken, and the reason for taking it, etc. The certificate annexed to the deposition complies with this section of the statute, with the exception that it does not state the reason for taking it.

Depositions taken under this statute can have no validity unless they comply substantially with the provisions enacted by the legislature, and no departure can be allowed from the requirements which the legislature have seen fit to impose. (*Campau v. Dewey*, 9 Mich. 381; *Wattles v. Moss*, 46 Mich. 52.) How. Stat. Sec. 7461 provides that when a witness whose testimony is required in any civil cause pending in this State shall live more than thirty miles from the place of trial, or shall be about to go out of the State and not to return in time for the trial, or is so sick, infirm or aged as to make it probable that he will not be able to attend the trial, his deposition may be taken in the manner thereafter provided. The three following sections provide for the notice to be given, by whom, and the time and manner of service. Although the statute does not in express words declare that the name of the witness proposed to be examined shall be given in the notice, yet it is clearly implied by its terms that the name of the witness shall be given in order to apprise the adverse party who it is he proposed to examine, as well as the time and place when he will be examined, and such has ever been the uniform practice in this State whenever the depositions of witnesses are taken, unless by express stipulation waiving such requirement. The notice given

to examine Patrick Horan did not authorize the examination of James Horan, and the deposition ought to have been excluded on the strength of this objection alone. The first, fourth and fifth objections are untenable. The third was good. As to the second, the statute does not require an affidavit to be served upon the defendant showing the circumstances and facts required by the statute for the taking the depositions. It is sufficient that the reasons required by the statute appear in the notice; but before such depositions can be read in evidence, the party producing them must make it appear satisfactorily to the court by *prima facie* proof at least that some one of the causes provided by the statute and stated in the notice authorizing their taking existed at the time and continues to exist; and where the practice has been pursued of attaching to the notice an affidavit setting forth the existence of one of the causes for taking the deposition as set forth in the statute, such affidavit would be *prima facie* evidence of such fact.

The plaintiff was called as a witness for himself, and testified that at the time of the collision he was sitting in his seat as if on the edge, and leaning back about straight, with his feet braced on the brace under the next seat, and that the jar of the train caused him to double up—to shut up like a hinge. That he was sitting next the window, and his wife next the aisle in the same seat. That his wife asked him what was the matter, and then the plaintiff stood up in the aisle; that a good many people were thrown into the aisle and others thrown over their seats. That after the people were out of the aisle, the plaintiff got up and moved into the next car, into which the fireman and engineer had been brought. The fireman was pretty badly cut about the head, and the plaintiff took hold of and washed his head. That he, plaintiff, thought he was severely shocked, but could not think he was seriously hurt. That the train was drawn back into the depot, a new train made up, and that the plaintiff and his wife took passage on the new train that was made up and went on towards Columbus. That while the plaintiff was washing the fireman's head there was a man came in and looked at the fireman and said, "I am the fool."

Objection was here made by the counsel for the defendant that what the man said was hearsay testimony and ought not to be admitted, and asked the court to stop the witness, and not to allow him to state anything further. As a further ground of objection, counsel for defendant stated that it did not appear that the man who said something had any connection with the defendant. Second, that the statement is not a part of the *res gestæ*; that it appears that the statement was made by a man in the passenger train of the Columbus, Hocking Valley & Toledo Railroad, upon which the plaintiff was riding, and that it was made subsequent to the accident. Third, that it was not competent to prove the statement of any brakeman of the Wabash train at any other time so

as to bind the company, it not appearing in evidence: First, that the person was an employé upon the train of the company; second, it not appearing that he had authority to act in the particular matter; and third, it not appearing in any way that it was his duty to open the switch; fourth, it not appearing in any way that the duty of opening the switch had been laid upon him as a servant of the defendant company.

The plaintiff then testified that the man who came into the car said, "I am the man that caused the accident. I am the man that opened the switch."

The witness further testified that the person speaking had on a badge marked "Brakeman," and he was allowed to testify, against defendant's objection, that he understood from what was said by the bystanders that he was a brakeman on defendant's train. The counsel for defendant requested the court to charge the jury that the alleged declarations of the brakeman do not bind the defendant, and such declarations must be made during the very transaction in order to bind the company at all, which request the court refused. This was error. The statement made by the brakeman after the accident as to his own acts as the producing cause is not competent evidence as an admission to fix liability upon the company. It was no part of the *res gestæ*, for the reason that such admission was not made while in the execution of his duty, or while the act to which it referred was being performed, and he was not so connected with the corporation defendant as to make his admissions the admission of defendant. The charge should have been given as requested, and the testimony was also inadmissible, and ought to have been excluded on the objection made.

The evidence received was, that a person wearing the badge of a brakeman came into the car where plaintiff was immediately after the accident and stated that he was the man that caused the accident; that he was the man that opened the switch. This testimony was received manifestly for the purpose of binding the defendant by an admission made by its agent. It could not be claimed that the testimony was admissible to prove the fact that the brakeman opened the switch. Such testimony would be clearly hearsay as applied to the proof of such fact—as much so as the declaration of any other person, being an entire stranger to defendant, made in the hearing of the plaintiff. If an agent had knowledge of any material fact, it is to be proved by his testimony, not by his assertion. If the declaration of this person was receivable at all, it must have been because it was an admission made by an agent, by which the principal is bound as admission made by him. But to be binding upon the principal as his admission, it must have been made by an agent having authority to represent the principal in the transaction in which it was made; and if made respecting his acts, two things must concur at least in

order to bind the principal. The acts must have been authorized or performed in the line of duty of the agent, and the declarations must have formed part of the *res gestæ*. The proof received failed to show: 1st. That the person making the statement was an agent of defendant. 2d. That such declaration was made while such person was in the performance of any duty for defendant. And it is apparent that such declaration was no part of the things done by such person as agent for defendant so as to constitute a part of the *res gestæ*. So far as the record shows, the act of the person making the declaration and to which he referred was that of an entire stranger to defendant. And if it be conceded that the person making the statement was the brakeman for defendant, yet so far as this record shows he may have done the act through malice and entirely outside his duty and one for which he might be personally liable, but for which defendant was in no manner responsible. There were numerous other exceptions taken, many of them without merit, and others unnecessary to pass upon here, as they will not be likely to arise upon a re-trial.

For the errors mentioned the judgment is reversed and a new trial granted.

The other justices concurred.

Liability of Railroad Company Using Track of Another Company.—Where a railroad company under contract with another company uses the track of the latter upon which to run its cars, it is liable to its passengers and servants for all injuries occasioned by defects in such track. *Murch v. Concord R. Corp.*, 9 Fost. (N. H.) 124; *Stetler v. Chicago & N. W. R. Co.*, 49 Wis. 609; *Wabash, St. Louis & Pacific R. Co. v. Peyton*, 106 Ill. 534.

Liability of Railroad Company Leasing its Track for Injuries to Passengers in its Own and Lessee's Cars.—A railroad company granting the use of its road to another company is responsible for accidents to passengers carried by itself occasioned by negligence in the running of the trains of the other company. *Railroad Co. v. Barron*, 5 Wall. 90. A railroad company is responsible for an injury to a passenger upon its line occasioned by the careless management of a switch under the control of another company, whereby such other company connects its road with that of the company first named. *McElroy v. Nashua & Lowell R. Corp.*, 4 Cush. 400. But a railroad company allowing another company the use of its road is not responsible for injuries to the passengers of such other company occasioned by defects in the track. *Murch v. Concord R. Corp.*, 9 Fost. (N. H.) 124.

Liability of One Lessee of Track for Injury to Passenger in Car of Other Lessee.—The present case seems to be the first in the books where a passenger in the cars of one lessee of a road has sued and recovered damages for injuries inflicted by the negligence of another lessee.

Declarations of Servants Admissible.—In case of a railroad accident the declarations of a servant or agent of the company who had an opportunity of being informed, made immediately after the accident, in relation to the nature or cause thereof, are admissible in evidence against the company. *Whitaker v. Eighth Ave. R. Co.*, 51 N. Y. 295; *Hanover R. R. Co. v. Coyle*, 55 Pa. St. 396; *Gerke v. California Steam Nav. Co.*, 9 Cal. 251; *Ohio & Mississippi R. R. Co. v. Porter*, 92 Ill. 437; *Brehm v. Great Western R. Co.*, 34 Barb. 256; *Sisson v. Cleveland & Toledo R. Co.*, 14 Mich. 489; *Pennsylvania Co. v. Rudel*, 6 Am. & Eng. R. R. Cas. 30; *Adams v. Hannibal & St. Joe R. Co.*, 7 Am. & Eng. R. R. Cas. 414.

When Declarations of Servants Inadmissible.—Declarations, however, which are not contemporaneous with the accident, or at least nearly so, are not admissible in evidence. *Luby v. Hudson River R. R. Co.*, 17 N. Y. 181; *Furst v. Second Ave. R. R. Co.*, 72 N. Y. 542; *Kansas Pac. R. Co. v. Painter*, 9 Kans. 620; *Michigan Central R. R. Co. v. Gouger*, 55 Ill. 503; *Coyle v. Baltimore & Ohio R. R. Co.*, 11 West Va. 94; *Hawkes v. Baltimore & Ohio R. R. Co.*, 15 West Va. 628; *Pennsylvania R. R. Co. v. Books*, 57 Pa. St. 389; *Chicago & N. W. R. Co. v. Fillmore*, 57 Ill. 265; *Robinson v. Fitchburg & W. R. Co.*, 7 Gray, 92; *Huntingdon & B. T. R. Co. v. Decker*, 82 Pa. St. 119; *Moore v. Chicago, R. I. & P. R. Co.*, 9 Am. & Eng. R. R. Cas. 401; *Curl v. Chicago, R. I. & P. R. Co.*, 11 Am. & Eng. R. R. Cas. 85.

How far Servants' Declarations Must be Contemporaneous.—As to the exact lapse of time which renders the evidence inadmissible, see the following authorities :

Short Time.—*Tanner's Executor v. Louisville & N. R. Co.*, 60 Ala. 621; *Virginia & Tenn. R. R. Co. v. Sayers*, 26 Gratt. 828; *Bellefontaine R. R. Co. v. Hunter*, 83 Ind. 385; *Dietrich v. B. & H. S. R. Co.*, 11 Am. & Eng. R. R. Cas. 115.

Long Time.—*Anderson v. Rome, W. & O. R. R. Co.*, 54 N. Y. 384; *Sims v. Macon & Western R. Co.*, 28 Ga. 93.

Declarations of Superintendent in Support of Servants.—Where the superintendent of the company makes declarations in support of an employé accused of negligence, some cases say that these declarations are admissible. *Malecek v. Town Grove & Lafayette R. R. Co.*, 57 Mo. 17.

Other authorities contain a contrary doctrine. *Hill v. New Orleans, Opelousas & Gt. West. R. R. Co.*, 11 La. Ann. 292; *New Orleans, Opelousas & Gt. West. R. R. Co. v. Williams*, 16 La. Ann. 815.

WHITE

v.

FITCHBURG RAILROAD COMPANY.

(136 *Massachusetts Reports*, 321.)

In an action against a railroad corporation for personal injuries sustained by the plaintiff while a passenger on a car of the defendant road, the accident being caused by another car coming violently against the car in which the plaintiff was riding while making a "flying switch," there was evidence that on other occasions the cars had come together with as much violence. Experts testified for the defendant that connecting cars in this way was a safe and prudent mode of management. One of them testified, on cross-examination, that there was a great dispute among railroad experts as to the safety of "flying switches." The plaintiff put in no expert testimony on this point. *Held*, that he was properly allowed to go to the jury on the question whether such a mode of connecting the cars, under all the circumstances of the case, was proper.

If a passenger in a railroad car standing on a side track is injured by the car being struck by the car of another corporation, through the negligence of a brakeman in the employ of such corporation in connecting the two cars for the purpose of carrying out a contract between the corporations for their joint benefit, an action may be maintained by the injured person against the corporation owning the car in which he was a passenger.

TORT for personal injuries received by the plaintiff while a passenger on the defendant's railroad, with a count in contract for a

breach of the defendant's contract to carry the plaintiff safely. Trial in this court, before Field, J., who reported the case for the consideration of the full court, in substance as follows:

It was proved or admitted that, at the time of the alleged injury, the plaintiff was a passenger in one of the defendant's cars; that he had purchased a ticket which entitled him to be carried therein from West Townsend to Boston; that the defendant owned a branch road leading from West Townsend and joining with its main road at a place called Ayer Junction, which branch is called the Peterboro' and Shirley branch; that at Ayer Junction the defendant's road is crossed at right angles by another road, called the Worcester & Nashua Railroad; that this road connects with the defendant's road by certain side-tracks, laid from the former to the latter road on the side opposite to that on which the Peterboro' and Shirley branch joins the same. By a contract between the defendant and the Worcester & Nashua Railroad Company, it was agreed, in order to run a line from Worcester to Boston, that each corporation should provide two passenger cars for this line; that each should haul at each trip one or more of said passenger cars over its line; and that the fares received on this line should be equally divided between the two corporations, the cars hauled by each to be taken up by the train of the other at Ayer Junction. By long practice between the roads, the connecting of the cars was performed by coupling the same on one of the side-tracks leading from the Worcester & Nashua Railroad to the defendant's road. The defendant's car coming over the Peterboro' & Shirley Railroad towards Boston was backed up on one of said side-tracks, and, being left by the locomotive, remained there until the Worcester & Nashua train arrived at the junction. The Worcester & Nashua train disconnected from its train such car or cars as were to be drawn to Boston at a point about half a mile from the connecting side-tracks, and from which there was so descending a grade that the car would move, if started, by its own momentum; said car, with a brakeman of the Worcester & Nashua Railroad Company, proceeded on by its own impetus, and was afterward directed by a switch on to the side-track, where it ran down towards and was to be connected with the defendant's car or cars, placed there for the purpose, by patent couplers. This process is called making a flying switch. On the day in question, the defendant's car, in which the plaintiff was riding, was backed up as usual on said side-track, and, while waiting there, the car from the Worcester & Nashua Railroad which was intended to be joined to the defendant's car came, under the direction of the brakeman of the Worcester & Nashua Railroad, and struck the Peterboro' & Shirley car, knocking said car forward four feet (breaking the glass chimneys of some of the lamps), from which collision, as the plaintiff alleged, he received the injuries sued for. It appeared

by the evidence of the defendant's witnesses that at some other times the car sent over the flying switch had struck the stationary car with as much violence as upon the occasion of the accident, but no harm had ever resulted therefrom. No evidence was offered as to the condition and equipment of the car coming from the Worcester & Nashua Railroad, or as to which road, the Worcester & Nashua or the defendant road, the particular car belonged, except that there was a brakeman upon it belonging to the Worcester & Nashua Railroad. But it did appear that the two cars were united by a self-coupling apparatus upon their respective platforms, instead of requiring a man to couple them by going between them to use a bolt.

The defendant called as witnesses William B. Stearns, its president, and John Adams, its superintendent, persons of long experience in the management of railroads, each of whom testified that it was a safe and prudent mode of management. The president admitted that there was a great dispute among railroad experts as to the safety of flying switches, some preferring switching engines and some flying switches.

The defendant contended that, upon the above facts, it was not liable for the injury, but that it was caused, if at all, by the negligence of the Worcester & Nashua Railroad; and that there was no other evidence tending to show negligence on the part of the defendant. The plaintiff contended, among other things, that it was carelessness on the part of the defendant to place its cars on said side-track and allow them to be connected as they were with the car from the Worcester & Nashua Railroad by means of a flying switch; but introduced no evidence on this point.

The jury returned a verdict for the plaintiff in the sum of \$7,500; and found, in answer to questions in writing put by the court, that both corporations were negligent.

C. A. Welch, for the defendant.

R. D. Smith & M. R. Thomas (*N. Abbott* with them), for the plaintiff.

COLBURN, J.—As a carrier of passengers, the defendant was bound, in the management of its cars and trains, and in making connections of cars, to exercise the highest degree of care which it could, reasonably, to prevent such injuries to its passengers as human care and forethought could avert. *McElroy v. Nashua & Lowell Railroad*, 4 Cush. 400; *Warren v. Fitchburg Railroad*, 8 Allen, 227; *Eaton v. Boston & Lowell Railroad*, 11 Allen, 500. The defendant was responsible for the method it adopted, or approved, for connecting with its trains the cars of the Worcester & Nashua Railroad. It was for the jury to determine whether the method adopted was safe and prudent. They had all the facts be-

fore them, and among others the descending grade, the distance that the moving car had to run by the impetus given it by the train from which it was detached, and the momentum resulting from the descending grade of the tracks; and the fact that on previous occasions violent collisions had occurred. They could form an opinion as to how far the speed of the car was liable to be varied at different times under the conditions stated, and by the force and direction of the wind; and how far it was safe and prudent to rely upon the judgment and skill of a brakeman upon the moving car under all these circumstances, with the effect of the weather upon the brakes, wheels and track, to bring the cars together with sufficient force to make the automatic connection, but not so as to cause damage.

Railroads have been so long in use, are so common and commonly used by the public, and the different methods adopted of managing trains and connecting cars and trains are so far matters of common observation, knowledge and experience, that, when all the facts were before them, the jury were competent to judge, without the aid of expert testimony, whether the method adopted in this case to accomplish the purpose intended was safe and prudent compared with other methods which might have been adopted to accomplish the same purpose. It was for the jury to determine how far the opinions of experts, which were in the case without objection, should influence their judgments, and how far the experts were liable to be biased by the fact that they had adopted or sanctioned the method in question, especially when they admit that a great difference of opinion exists among railroad experts as to the safety of the method adopted in this case compared with other methods.

Whether the use of what is termed a "flying switch" is safe and prudent, in any given case, is not a question of law, but of fact, to be determined according to the conditions and circumstances existing in that case. We cannot say that, under the evidence and circumstances of this case, the jury were not warranted in finding the defendant to have been negligent. It is not questioned that the brakeman on the moving car was negligent, and that the jury were warranted in finding that the Worcester & Nashua Railroad Company, in whose employ he was, its servants and agents, were guilty of negligence. The brakeman, though in the employ of the Worcester & Nashua Railroad Company, was engaged in a service which the two corporations had agreed should be performed for their joint benefit. He was acting for the defendant, with its express or implied approval, as well as for the other corporation, and the defendant must be held responsible to the plaintiff, whom it had contracted to carry safely, for an injury resulting from the negligence of this brakeman, to which it had voluntarily exposed him. *Eaton v. Boston & Lowell*

Railroad, *ubi supra*; Great Western Railway v. Blake, 7 H. & N. 987; Thomas v. Rhymney Railway, L. R. 6 Q. B. 266.

Judgment on the verdict.

Flying Switch.—The use of the flying switch at or near a public crossing is ordinarily deemed, as to the general public, to be negligence *per se* where sufficient warning is not given. French v. Taunton, etc., R. Co., 116 Mass. 537; Hinckley v. Cape Cod R. R. Co., 120 Mass. 257; Brown v. New York, etc., R. R. Co., 82 N. Y. 597; Sutton v. New York, etc., R. R. Co., 66 N. Y. 243; Butler v. Milwaukee, etc., R. R. Co., 28 Wisc. 487; Chicago, etc., R. R. Co. v. Garvey, 58 Ill. 83; Illinois, etc., R. R. Co. v. Hammer, 72 Ill. 147; Illinois Central R. R. Co. v. Baches, 55 Ill. 379; Phila. & Reading R. R. Co. v. Troutman, 6 Am. & Eng. R. R. Cas. 117; Chicago & N. W. R. R. Co. v. Taylor, 69 Ill. 461; Clark v. Boston & Albany R. R. Co., 128 Mass. 1; s. c. 1 Am. & Eng. R. R. Cas. 134.

Company Transporting Passengers Liable for Negligence of Another Company whose Lines or Stations they Use.—A railroad company undertaking to transport passengers is chargeable with the negligence of another company whose lines or stations they may use when injury is occasioned to the passengers thereby. Murch v. Concord R. Corp., 29 N. H. 9; Peters v. Ryland, 20 Pa. St. 497; Seymour v. Chicago, etc., R. Co., 3 Biss. 43; Birkett v. Whitehaven Junction R. Co., 4 Hurl. & N. 730; Great Western R. Co. v. Blake, 7 Hurl. & N. 987; Stetter v. Chicago & N. W. R. Co., 49 Wisc. 609; Wabash, St. L. & P. R. Co. v. Peyton, 106 Ill. 534; Buxton v. North Eastern R. Co., L. R. 3 Q. B. 549; Thomas v. Rhymney R. Co., L. R. 5 Q. B. 226; s. c. L. R. 6 Q. B. 266.

But see, *contra*, Sprague v. Smith, 29 Vt. 421; Clymer v. Central R. Co., 5 Blatchf. 317.

See also Patterson v. Wabash, St. L. & P. R. Co., and note, *supra*, upon an analogous topic.

TOMPKINS

v.

CLAY STREET HILL R. Co. *et al.*

(*Advance Case, California, November 28, 1884.*)

Where the injury of a passenger by a collision is the result of mutual negligence of the carrier and of the driver of another vehicle, such passenger may recover from the owners of either or both vehicles. Though the plaintiff sue both, he may ordinarily dismiss as to either, and if it be proven that one was not guilty of negligence, he may, on sufficient evidence of negligence, take a verdict against the other.

In an action by a passenger of one carrier against another carrier for injury caused by a collision between both, he must prove negligence against the defendant, not presumption of negligence arising against such carrier from the fact of the injury. The defendant would be entitled to an instruction of this nature, and a general instruction that plaintiff must make out his case by a preponderance of evidence is not equivalent thereto.

A release or discharge of one carrier from all liability on account of the injury, for a compensation, operates as an estoppel of the passenger to deny the liability of such carrier, and prevents him from afterwards maintaining an action against the other carrier for the same injury.

APPEAL from the Superior Court of the city and county of San Francisco.

Estee & Boalt, for appellant.

Garber & Thornton and *Fred. A. Berlin*, for respondents.

McKINSTRY, J.—A car of the Clay Street Hill Company collided with a car of the Sutter Street Railroad Company at the crossing of Clay and Polk streets, San Francisco. Plaintiff, a passenger in the car of the latter company, was thrown from her seat and injured. The complaint charges neglect on the part of both companies. Plaintiff recovered damages of the Clay Street Company, and the appeal is by that company.

In Pennsylvania it seems to have been held that when a passenger on a carrier vehicle is injured by a collision resulting from the mutual negligence of those in charge of it and another party, the carrier alone must answer for the injury (*Lockhart v. Lichtenthaler*, 10 Wright, 151; *Philadelphia & R. R. Co. v. Boyer*, 97 Pa. St. 100); but the weight of authority is otherwise, and is to the effect that if the negligence of the managers of both vehicles contributes to the injury the party injured may recover from the proprietors of either or of both. *Whart. Neg.* 395, and cases cited. Where both are sued, the plaintiff may ordinarily dismiss as to either, and if it turn out at the trial that one was not guilty of negligence, he may, on sufficient evidence, take a verdict against the other. The court below charged the jury:

“In civil cases (and this is a civil case) the affirmative of the issue must be proved, and when the evidence is contradictory your decision must be made according to the preponderance of the evidence.”

But the court refused to charge—at the request of defendant, the Clay Street Hill Railroad Company—

“If you find from the evidence that the plaintiff was a passenger on the street-car of the defendant the Sutter Street Railroad Company, then I instruct you that no presumption of negligence, as against the Clay Street Hill Railroad Company, arises from the fact of the injury, and that the plaintiff must show, by a preponderance of the testimony, that the defendant the Clay Street Hill Railroad Company was guilty of negligence.”

The appellant was entitled to have the attention of the jury called to the point that, in considering the evidence, the mere circumstance that plaintiff had been injured as a result of the collision did not create a presumption of negligence on appellant's part. The general charge, to the effect that the plaintiff must make out her own case by a preponderance of evidence, was not the equivalent of the specific instruction requested. The defendant, the Clay Street Railroad Company, also asked the court to charge:

"(2) You are instructed that if you find from the evidence that the plaintiff has received from the Sutter Street Railroad Company, one of the defendants in this action, compensation for the injuries alleged in the complaint, your verdict must be for the defendant. (3) The Sutter Street Railroad Company is joined as a defendant in this action with the Clay Street Hill Railroad Company. The plaintiff by her complaint alleges a joint injury, and asks for a joint judgment against the two defendants. The defendant Clay Street Hill Railroad Company, by its supplemental answer, avers that plaintiff has released and discharged the Sutter Street Railroad Company. If you find from the evidence that the plaintiff has received any sum of money whatever from the defendant Sutter Street Railroad Company, as compensation for the injuries received by her, and has released and discharged the defendant the Sutter Street Railroad Company from all claim for damages arising out of this action, then you are instructed to bring in your verdict for the defendant the Clay Street Hill Railroad Company."

To the refusal to give the instructions asked the said defendant excepted. If both defendants were guilty of negligence, it seems to be conceded by respondent the requested instructions, or one of them, properly declared the law; and such was the view of the court below. The learned judge charged the jury:

"If you find from the evidence that both defendants are jointly in fault for the plaintiff's injuries, you will find a verdict for the defendant, because the payment by the Sutter Street Company operates as a release to both defendants. If, however, you find that only the Clay Street Hill Railroad Company was in fault, you will find a verdict for the plaintiff against that defendant and assess the damages. You are instructed that if you find from the evidence that the plaintiff has received from the Sutter Street Railroad Company, one of the defendants in this action, compensation for the injuries alleged in the complaint, your verdict must be for the defendants, unless you find that the defendant who paid the money was innocent of fault as to the tort."

Every party contributing to the injuries of plaintiff was liable to the full extent of the damages by her sustained. Her injuries gave her but a single cause of action. If she had brought a separate action against the Sutter Street Company, and recovered a judgment therein, and such judgment had been satisfied, she could not subsequently have maintained another action for the same injuries against the Clay Street Company, inasmuch as the conclusive presumption would be that she had already received full compensation for all damages by her sustained. Damages resulting from the same wrongful transaction are ordinarily inseparable; she could not recover part from one and part from the other defendant. And so, if her damages resulted directly

from the negligence of both defendants, and plaintiff received from the Sutter Street Company compensation for her injuries, and released that company, she ought not to have recovered a judgment against the Clay Street Company. As was said in *Urton v. Price*:

"It is to be observed, when the bar accrues in favor of some of the wrong-doers by reason of what has been received from or done in respect to one or more of the others, that the bar arises, not from any particular form that the proceeding assumes, but from the fact that the injured party has actually received satisfaction, or what in law is deemed the equivalent." 57 Cal. 272.

And Judge Cooley, from whose book on the Law of Torts the foregoing observation is taken, adds:

"Therefore, if he receives the satisfaction voluntarily made by one, that is a bar as to all." Page 139.

It is urged by counsel for appellee that the rule only applies where the money is paid by or the release executed to one who is himself actually guilty of the wrong or negligence. If it be conceded that a release to or receipt of money in alleged satisfaction from one, not himself a trespasser, will not discharge those actually guilty, the question still remains: Can the plaintiff, under the circumstances, be permitted to deny that the Sutter Street Railroad Company was guilty of negligence directly contributing to the injuries by her received? Reading the release and stipulation in the record, it is plain the \$550 was paid in settlement of the action pending, in so far as the cause of action alleged constituted a claim against the Sutter Street Company. The compromise of an asserted claim does not necessarily involve an admission on the part of him against whom the claim is asserted that the claim is well founded. But one who, having commenced an action against another, has received money in consideration that the action shall be dismissed, or that any judgment he may recover shall not be enforced, ought not to be permitted to deny that he received the money in satisfaction of a valid demand. The defendant paying the money may subsequently say: "I did not and do not admit that I ought to have paid anything; I was willing to buy my peace." But the other party ought not to be allowed to deny that he had any right to the money, the payment of which he had induced under pain of the prosecution of an action already commenced. He should not be permitted to say, with any beneficial result to himself, "I pursued the defendant *falso clamore*, and I took his money by way of settlement of a pending action in which I never could have recovered." Shall it be said that plaintiff has not received compensation for the injuries she sustained because she did not choose affirmatively to prove that the negligence of the party from whom she received the money contributed to the injuries? The plaintiff must be held to

have received from the Sutter Street Company satisfaction for the very same injuries for which she obtained a judgment against the appellant.

In *Turner v. Hitchcock*, 20 Iowa, 314, the notice by the plaintiff to one of the defendants was not a technical release, and there was no evidence that it was given upon or for a consideration. It was at most a mere promise, without consideration, not to prosecute the action against the particular defendant, so that if he had been admittedly a co-trespasser with the other defendants, the notice would not have released the others. It had been well settled that a covenant not to sue is not such a *release* as will discharge the co-trespassers. The remark of the learned judge—"Nor do we think, as argued by appellee, that plaintiff, having sued Johnson as a joint trespasser, was estopped," etc.—was not necessary to the decision; and while the suggestion may have been made by counsel for appellee in oral argument, the whole question as to a discharge of defendants by reason of the notice seems not to have been considered worthy of a place in their *points*, as printed in the report of the case. Under the circumstances, we think the remark referred to is not to be accorded the weight of a deliberate judgment upon a question involved in a legal controversy.

Judgment and order reversed, and cause remanded for a new trial.

We concur: McKEE, J.; Ross, J.

In Case of Collision with Conveyance of other Party Negligence of Carrier Transporting Passenger is Imputed to Him.—It was originally held in England that where a passenger in the conveyance of a carrier is injured by a collision with the conveyance of another party he cannot recover damages from such other party when there has been negligence in the management of the conveyance in which he himself was riding. The party is, to a certain extent, identified with the carrier transporting him, so that the negligence of the latter will be imputed to the former. *Thorogood v. Bryan*, 8 C. B. 115; *Rigby v. Hewitt*, 5 Exch. 240; *Greenland v. Chaplin*, 5 Exch. 243; *Armstrong v. Lancashire, etc., R. Co.*, L. R. 10 Exch. 47.

Rule in the United States.—In the United States the rule has been adopted in some of the State courts. *Lockhart v. Lichtenthaler*, 46 Pa. St. 151; *Prideaux v. Mineral Point*, 43 Wisc. 518; *Payne v. C. R. I. & P. R. Co.*, 39 Iowa, 523; and see *Phila. & Reading R. R. Co. v. Boyer*, 2 Am. & Eng. R. R. Cas. 172.

As a rule, however, the American courts have taken up the opposite position, and have held that a passenger injured by collision with the conveyance of another party is not estopped from maintaining an action against such other party by negligence in the management of the vehicle in which he has been himself riding. *Bennett v. New Jersey R. R. & Trans. Co.*, 86 N. J. L. 227; *Chapman v. New Haven R. Co.*, 19 N. Y. 341; *Colegrove v. New York, etc., R. Co.*, 20 N. Y. 492; *Louisville, etc., R. Co. v. Case's Adm'r*, 9 Bush. 728; *Danville, etc., Turnpike Co. v. Stewart*, 2 Metr. (Ky.) 119; *Wabash, St. L. & Pac. R. Co. v. Shacklet*, 12 Am. & Eng. R. R. Cas. 166.

Carrier Transporting Passenger is Liable notwithstanding Concurrent Negligence of Other Party.—A passenger in such a collision as is de-

scribed above may, of course, elect to sue the carrier transporting him. In such case the concurrent negligence of the other party constitutes no defence. *Eaton v. Boston, etc., R. Co.*, 11 Allen, 500; *Rylands v. Peters*, 1 Phila. 264; *Spooner v. Brooklyn City R. Co.*, 54 N. Y. 230.

Joint and Several Liability of Both Parties in Fault.—He may elect to sue both parties in fault jointly, or may sue each separately. *Wabash, St. L. & P. R. Co. v. Shacklet*, 12 Am. & Eng. R. R. Cas. 166.

RENNEKER

v.

SOUTH CAROLINA RAILWAY CO.

(20 *South Carolina Reports*, 218.)

Plaintiff was injured by falling off from a station platform at night. He was at the time walking up the platform, which was incumbered with freight and insufficiently lighted, towards a train upon which he intended to take passage. The court charged that if at the time he was going along, using his senses with ordinary care and fell off by a stumble, that was not a lack of ordinary care, because different people have different temperaments, and one can do safely what another cannot; and that the company had no right to demand extraordinary care from any one. *Held*, that this instruction was erroneous, inasmuch as the jury might infer from it that the company was liable for the result of any casualty on their platform, only provided the party suffering it was at the time using his senses, good or bad.

A railroad company is bound, as to passengers and persons intending to become passengers, to make such arrangements as is suitable to preserve from harm reasonable and prudent men in possession of ordinary senses and capacities. There is no obligation to provide arrangements suitable to the protection of persons falling below that standard, physically or mentally. Such persons must be cautious and prudent in proportion to their defects.

Railway companies, though held to a high degree of care, do not insure under all circumstances the safety of passengers, or those seeking to become passengers; their liability is conditioned on the exercise by them of reasonable and proper care and caution.

ACTION by John H. Renneker against the South Carolina Railway Company. The opinion states the case.

J. F. Izler and Mitchell & Smith, for appellant.

No argument *contra*.

McGOWAN, J.—This was an action against the defendant corporation for damages on account of personal injuries to the plaintiff from falling off the railroad platform at Orangeburg on the night of February 8th, 1882, when he was seeking to enter the cars for Charleston; which injuries he alleged were caused “by the negligence of the company in and about the arranging, making, procuring and keeping suitable platforms and conveniences for the ingress and egress of passengers on said road, and

in and about the lighting up the said road and platform, and the said conveniences for the ingress and egress of passengers for transportation on said road," etc. The defendant answered, denying all allegations of negligence; and affirming that the fall of the plaintiff, and "any injury he may have received, was not in any way caused by or due to the negligence of the defendant or any of its servants, agents or employes; but, on the contrary, that such fall, and any injury received therefrom, was wholly due to and arose entirely from the carelessness, negligence and fault of the plaintiff himself, and from no other cause whatever."

The case came on for trial before Judge Pressley and a jury. Much testimony was offered on both sides; but it is not necessary for our present purpose to do more than state the leading facts in a general way. The down train passed Orangeburg after dark; and the night was dark and drizzly. The plaintiff went to the station before the time for the arrival of the train, and waited in the telegraph office and the ladies' waiting-room. Having a thousand-mile ticket, and hearing the signal for the approach of the train, he left the waiting-room and started to walk—with the other persons about to board the train—up the outside platform, passed the express freight in the direction of the approaching train; and, while walking with Mr. Wannamaker, fell off the platform and was injured. He was taken up and cared for before the train actually arrived. The case turned upon the questions of fact: 1. Whether the platform was properly lighted. 2. Whether the express freight was improperly allowed to incumber it, etc. 3. Whether there was contributory negligence on the part of the plaintiff in leaving the waiting-room before the proper time, or in not exercising the care required of a reasonable man in possession of all his senses.

The defendant tendered twenty different requests to charge, some of which were refused by the judge, and others charged in the whole or with modifications; but we need only refer to such rulings as were excepted to. The jury rendered a verdict in behalf of the plaintiff for \$1,500, and the company appeals to this court upon eight exceptions, of which the last is as follows: "8. Because his Honor charged: 'If plaintiff was walking along beside Mr. Wannamaker, using his senses—that is, his eyesight—and was going along with the ordinary care that a person would naturally use, and fell off by a stumble, or by the passage-way being too narrow, or from want of light, or anything of that sort, then that is not lack of ordinary care, because different persons have different temperaments, and one person may do a thing safely which another man cannot. One man may walk a narrow plank with perfect safety, while many others could not. The company has no right to require extraordinary care from any one;' whereas, he should have charged that the company is not

bound to allow for individual temperament, but that the plaintiff was bound to exercise all the care and precaution that would be required by any ordinary, average reasonable man."

We have not found it necessary to consider any of the grounds of appeal except the last one. In the view which the court takes, that will dispose of the case. It is undoubtedly true that the action of the plaintiff rests entirely upon the alleged negligence of the company; but it is, nevertheless, incumbent on him to show that he has not been guilty of contributory negligence—that is to say, that he observed proper care under the circumstances. Even upon the assumption that the defendant was negligent, the plaintiff could not recover if he contributed to the misfortune by his own negligence, or want of ordinary care and caution. Two things must concur to support the action: an obstruction in the road on the part of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff." See *Butterfield v. Forrester*, 11 East, 62; *Baltimore & P. R. R. Co. v. Jones*, 95 U. S. 439, and authorities therein collected; *Richardson v. W. & M. R. R. Co.*, 8 Rich. 126; 2 Red. Rail. 194 and notes.

The judge charged this principle correctly, but he added: "If the plaintiff was going along using his senses—that is, his eyesight—with the ordinary care that a person would naturally use, and fell off by a stumble, then that is not lack of ordinary care, because different persons have different temperaments, and one person may do a thing safely which another man cannot. One man may walk a narrow plank with perfect safety, which many others could not do. The company has no right to require extraordinary care from any one." Was this error? While the statement of fact made may be perfectly true in the abstract, we think in the connection in which it was made it might have been misunderstood by the jury as authorizing them to charge to the negligence of the company the result of any casualty on their platform, only provided the party suffering it was at the time using his senses, good or bad.

Is there not such a thing as a pure casualty, accidental, fortuitous, and without fault on the part of any one, so far as imperfect human knowledge can discover? And besides, what is proper caution, and by what rule is it to be determined? The rule is plain and unmistakable, but its application is often exceedingly difficult and unsatisfactory. As Mr. Pierce, in his book on railroads, at page 312, states it, "The standard of negligence is so variable and even intangible, and sentiment and caprice are so apt to disturb the verdict of juries in charges of personal injury, that the corrective function of the court in supervising verdicts in such cases is essential to the administration of justice." Does the term "ordinary caution" mean no more than the use of the senses, without any regard to the infirmities of temperament, which is defined to

be mental or bodily constitution? It is certainly very vague and uncertain to make proper care vary with the varying capacities or infirmities of men. When the rights and obligation of one party are made to turn upon the proper caution of another, it would seem that there should be some common standard by which to test the fact, and we know of none practicable other than that of a prudent, reasonable man, in possession of the ordinary senses and capacities. When arrangements are made suitable and proper for such persons, nothing more should be required, and one falling below this standard, either physically or mentally, should be cautious and prudent in proportion to such defects.

Railway companies, though held to a high degree of care, do not insure the safety of passengers or those seeking to become passengers under all circumstances; their liability is conditioned on the exercise of reasonable and proper care and caution. "Negligence is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such a person under the existing circumstances would not have done. The essence of the fault may lie in omission or commission. The duty is dictated and measured by the exigencies of the occasion." *Baltimore & P. R. R. Co. v. Jones*, 95 U. S. 439; *Lake Shore & M. S. R. R. Co. v. Miller*, 25 Mich. 274; *Baltimore & P. R. R. Co. v. Whitacre*, 35 Ohio St. 627; *Pierce Rail.* 345 and authorities. In the case from Michigan it was held that "absentmindedness" was not a legal excuse for failing to observe the precaution of looking and listening before crossing a railroad track.

Mr. Redfield says: "In a recent English case—*Crafter v. The Met. Railway Co.*, 12 Jur. (N. S.) 272—the question of the degree of caution required of passenger carriers is carefully considered. It is here said that in determining whether evidence of negligence has been given before the jury the court must use the ordinary experience of life, and consider whether the evidence of negligence be reasonable. And in commenting on the case (which was where the plaintiff fell upon a staircase in going from the platform into the street, in consequence, as he alleged, of the stairs being rendered slippery by reason of brass upon the edge of the steps, and having no hand-rail upon the top of the banisters) learned judges declare that passengers are not entitled to have every precaution to insure safety which it is possible to suggest after an accident has occurred." 2 Redf. Rail. 201.

It is the judgment of this court that the judgment of the circuit court be set aside, and the cause remanded for a new trial.

Stations and Platforms.—As to the duty of a railroad company to provide safe platforms and stations, see *Buenemann v. St. Paul, M. & M. R. Co.* and note, *infra*.

BUENEMANN

v.

ST. PAUL, M. & M. RY. CO.

(Advance Case, Minnesota, August 21, 1884.)

A railway carrier of passengers is bound to use every reasonable means to keep in a safe condition all portions of its platforms and approaches thereto to which passengers, or those who have purchased tickets with a view to take passage on its cars, would naturally or ordinarily be likely to go. This includes the duty of properly lighting at night their depots, and approaches to and from their trains.

The evidence in this case considered, and *held* sufficient to justify a jury in finding that the defendant was negligent in not properly lighting its depot and approaches.

Where a trial court is of opinion that a verdict, although supported by some evidence, is against the weight of evidence, they may be justified in setting it aside, and submitting the case to a second jury, when they would not feel warranted in disturbing a second verdict, although rendered on the same evidence.

Although the evidence in this case, in our opinion, tends to prove contributory negligence on the part of the plaintiff, yet it does not do so so clearly as to justify this court in holding, as a matter of law, that he was guilty of such negligence, especially as against the verdicts of two successive juries, and the action of the trial court in refusing to set aside the last verdict.

APPEAL from judgment of District Court, Ramsey county.

C. K. Davis, for respondent, Stephen F. Buenemann.

R. B. Galusha, for appellant, the St. Paul, M. & M. Ry. Co.

MITCHELL, J.—The defendant's depot at Alexandria, where the injury complained of occurred, was a wooden building 160 feet long by 24 feet wide, surrounded by a platform 16 feet wide on the north side and about 11 feet on the south side, and extending each way beyond the ends of the building about 48 feet, with steps at each end to go up and down. The building was used as a "combination" depot, the east end being used as a freight house, and the west 36 feet as an office and passengers' waiting-room. The partition between the office and the waiting-room ran north and south, the waiting-room being on the west end of the building. There were two small windows on the west end of the waiting-room, and one on the north side; also a window on the north side of the office. The platform was elevated about four feet from the ground. The railroad track was on the north side of the platform, and so close to it that when a train stopped there passengers stepped from the cars to the platform, and *vice versa*. The place where carriages and omnibuses stood to receive or deliver passengers was near the south-west corner of the platform.

The night was dark, and there were no lights outside the building to light the platform or approaches. The only lights inside the building were two kerosene lamps—one on the counter in the waiting-room, and the other in the office near the operator's table. On the night in question the plaintiff, who had never been there before, arrived as a passenger on defendant's train from St. Paul about 8 o'clock in the evening, and after dark. On alighting from the train he was guided by the omnibus agent with a lantern to the omnibus, stepped into it from the platform, and was driven to the hotel, and went to bed. Desiring to return to St. Paul that same night, he was awakened between 1 and 2 o'clock in the morning, and driven in the omnibus to the depot, and guided by the omnibus agent with a lantern into the waiting-room. We shall take as true plaintiff's own statement as to what subsequently occurred, as the jury were at liberty to accept it as true. After a short time a passenger train arrived and stopped at the platform. On seeing this plaintiff went out for the purpose of entering the cars. He saw two men with lanterns unloading baggage from the baggage-car onto the platform. He also saw a passenger coach standing opposite the waiting-room. This car was lighted within by three sperm candles, the light of which was visible through the car windows. The only light on the platform was what little was shed through the depot windows from the two kerosene lamps within, and through the car windows from the sperm candles. That this only imperfectly lighted a small part of the platform and left the remainder in darkness is very evident from the evidence. Counsel for defendant are evidently indebted to their imagination for the "flood of light" of which they speak. On going out, plaintiff, preferring to ride in the rear car of the train, and thinking there might be one behind the one standing opposite the waiting-room, walked towards the rear to see if there was another car, and having gone, as he says, far enough to see that there was none, was in the act of turning around, when he missed his step and fell off the platform upon the ground, having evidently in the darkness gone too near the edge. The evidence was clearly sufficient to justify the jury in finding that defendant was guilty of negligence in not properly lighting the platform and approaches. A railway carrier of passengers is bound to use all reasonable means to keep in a safe condition all portions of its platforms and approaches to which the public do or would naturally resort, and all portions of their station grounds reasonably near to the platform where passengers, or those who have purchased tickets with a view to take passage on its cars, would naturally or ordinarily be likely to go. *McDonald v. Chicago & N. W. R. Co.*, 26 Iowa, 124. This includes the duty of properly lighting at night their platform, and the approaches to and from trains.

It is, however, strongly urged that plaintiff himself was negligent in walking in the dark towards the rear of the car on a platform which he knew was elevated from the ground, when he might have entered the lighted car which was in sight. The preference to obtain a seat in the rear car, if there was another, was not an unnatural one. To go to look if there was another car was also natural. It does not appear from the record and cannot be determined how far he went; for a great deal of the evidence is entirely unintelligible, it being given with reference to a diagram which is not before us. But it does not appear that he went further than was necessary to see that there was not another coach to the rear, and hence, presumably, did not go any great distance beyond the rear of the coach in sight. He was a stranger and was not familiar with the ground; but conceding, as we must, that he saw that it was dark, and knew that the platform was elevated, and, as counsel say, ended somewhere, yet might he not assume, when he saw that the company had left the platform unlighted, that they would not leave a passenger coach so near the end of the platform as to endanger the safety of passengers who might be seeking to approach either end of the car. So far as we can arrive at a conclusion from the imperfect manner in which the evidence is brought before us, we admit we are personally strongly impressed with the idea that plaintiff was negligent, but by no means so clearly as to so hold as a matter of law against the verdicts of two juries, and the opinion of both of the learned judges who presided at the respective trials in the court below. Although not necessarily controlling, yet the fact that two successive juries have, under proper instructions as to the law, exonerated the plaintiff from the charge of contributory negligence, is entitled to some weight as tending to show that at least there is reasonable ground for a difference of opinion on the question.

The suggestion of counsel, that if the court below was justifiable in granting a new trial after the first trial, it was error to refuse it after the second, is not necessarily correct. Where the trial court is of opinion that a verdict, although supported by some evidence, is against the great weight of the testimony, they may often be justified in granting a second trial and submitting the case to another jury, when they would not feel warranted in disturbing a second verdict on the same evidence.

Under all the circumstances, we do not feel at liberty to reverse the action of the trial court.

Order affirmed.

Obligation to Keep Stations Lighted and in Repair.—It is the duty of a railroad company to keep its stations and the approaches thereto in a reasonably safe and sound condition, and also to have them properly lighted at night for the safety and accommodation of those who are properly in and

about the building. *Indiana, etc., R. Co. v. Hudecoon*, 13 Ind. 625; *Chicago, etc., R. Co. v. Wilson*, 63 Ind. 167; *McDonald v. Chicago & N. W. R. Co.*, 26 Iowa, 125; s. c. 29 Iowa, 170; *Pittsburgh, etc., R. R. Co. v. Brigham*, 29 Ohio St. 374; *Knight v. Portland, etc., R. R. Co.*, 56 Me. 234; *Beard v. Connecticut, etc., R. Co.*, 48 Vt. 101; *Hulbert v. New York, etc., R. Co.*, 40 N. Y. 145; *Illinois, etc., R. Co. v. Godfrey*, 71 Ill. 500; *Patten v. Chicago, etc., R. Co.*, 32 Wisc. 524; *Seymour v. Chicago, etc., R. Co.*, 3 Biss. 43; *Bennett v. Louisville & Nashville R. R. Co.*, 1 Am. & Eng. R. R. Cas. 71; *Stewart v. T. & G. N. R. R. Co.*, 2 Am. & Eng. R. R. Cas. 497; *Louisville, etc., R. R. Co. v. Wolfe*, 5 Am. & Eng. R. R. Cas. 625; *Renneker v. South Carolina R. Co.*, 20 S. C. 218, s. c. *supra*.

As to Parties Loading and Unloading Freight.—Persons who have business with the company at the stations, such as loading or unloading freight, are entitled to protection, and may recover for an injury occasioned by the unsafe condition of the building, or a failure to light it properly. *Wright v. London & N. W. R. Co.*, L. R. 10 Q. B. 298; *Holmes v. North Eastern R. Co.*, L. R. 4 Exch. 254; *Louisville & N. R. Co. v. Wolfe*, 5 Am. & Eng. R. R. Cas. 625; *Toledo, W. & W. R. Co. v. Grush*, 67 Ill. 262; *Tobin v. Portland S. & P. R. Co.*, 59 Me. 183.

As to Parties Speeding and Welcoming Friends.—A railroad company is also liable for an injury from such cause, occasioned to parties at the station who are speeding or welcoming friends departing or arriving by the company's trains. *Lucas v. New Bedford, etc., R. Co.*, 6 Gray, 64; *Keokuk Packet Co. v. Henry*, 50 Ill. 264; *Doss v. Missouri, etc., R. Co.*, 59 Mo. 27; *Langan & St. Louis, etc., R. Co.*, 3 Am. & Eng. R. R. Cas. 355; *McKone v. Michigan Central R. Co.*, 13 Am. & Eng. R. R. Cas. 29.

As to Parties Having no Right at Station.—There is, however, no liability to parties who are mere trespassers in and about the station. *Baltimore & Ohio R. Co. v. Schwindling*, 8 Am. & Eng. R. R. Cas. 544. Or to parties who have no business there. *Pittsburgh, Ft. W. & C. R. Co. v. Bingham*, 29 Ohio St. 364; *Gilles v. Pennsylvania R. R. Co.*, 59 Pa. St. 129. Or to passengers who come into the station an unreasonable time before the train on which they intend to take passage departs. *Harris v. Stevens et al.*, 31 Vt. 79; and see *Tebbutt v. Bristol & Exeter R. Co.*, L. R. 6 Q. B. 73.

McCORKLE

v.

CHICAGO, ROCK ISLAND & PACIFIC RY. CO.

(61 Iowa Reports, 555.)

Where plaintiff, having cattle upon defendant's train, was entitled to ride in the "caboose," but, being some distance in front of the "caboose" when the train started, and when it had attained such a rate of speed that he thought he would not be able to mount the "caboose" when it came along, he attempted, in the night time, with his right hand incumbered with a lantern and a prod-pole, to climb upon one of the freight cars of the train; *held*, that he was, as a matter of law, guilty of contributory negligence; and these facts appearing from plaintiff's own testimony, the court should, on defendant's motion, have directed a verdict in its favor.

APPEAL from Marion District Court.

Action to recover for personal injuries received by plaintiff.

There was a judgment for plaintiff upon a verdict in his favor. Defendant appeals. The facts are fully stated in the opinion.

M. A. Low, for appellant.

Stone, Ayers & Co., for appellee.

BECK, J.—The undisputed facts of the case relating to the injury and the cause thereof, as shown by plaintiff's own testimony, are as follows:

The plaintiff, with two or three men in his employment, accompanied six car-loads of cattle which were transported for him upon defendant's railroad. Upon reaching Joliet, Illinois, he was informed by the conductor of the train that it would stop fifteen minutes, for the purpose of giving plaintiff an opportunity to inspect the cattle, and if any of them were found "down," to give them necessary attention. After the train had stopped, plaintiff, with a lantern and a prod-pole, accompanied by his men, commenced the inspection of the cattle. All being on the same side of the train, it was found that, as it was quite dark, the condition of the cattle could not be discovered without a light on the other side of the train. Thereupon plaintiff, with the lantern and prod-pole, crept under the cars to the other side, and by holding up his lantern his men could discover whether any of the cattle were "down." Before they had completed the examination, and before the expiration of fifteen minutes after the train stopped, it was started. The plaintiff heard no signal for starting, though he says that he heard bells of other trains, as he supposed. One of his own witnesses testified positively that a signal for starting was given by ringing the bell of the engine. The plaintiff, noticing the increasing speed of the train, concluded that when the "caboose" would reach him the speed would be too great to allow him to get upon it, and, in this belief, he attempted to climb upon a passing freight car. He caught with his left hand the "hand holds" and, in his own language, made "a pitch forward to get my foot into the stirrup of the car; and when my foot came down my right foot went into a hole." He then proceeds to relate his struggle to climb upon the car, all the time holding the prod-pole and lantern in his right hand. Finding it impossible to gain the top of the car, he attempted to throw himself away from the car, when he fell, the wheels of the car ran over his left arm, rendering immediate amputation necessary. The car was on a bridge over a street when he attempted to climb upon it, and the hole in which he stepped was caused by a broken plank in the floor. Plaintiff was not aware that he was upon the bridge, and did not know of the hole when he attempted to mount the car. He was impelled to the attempt to do so by the fear that he could not get upon the "caboose" when it should pass him, and he would be left by the train. The rate of speed of the train is not shown with clearness. Plaintiff

declares that "it was going pretty lively," and that he feared the increased speed would be such that he could not get upon the "caboose." The train had about thirty-two cars. It was not shown how far he was from the "caboose," but he states that he could see its lights.

The negligence of the defendant complained of is the suffering the broken plank in the bridge. It may, for the purposes of the case, be admitted that this constituted negligence. But we think the conceded facts of the case show that plaintiff was guilty of such contributory negligence as to defeat his right of recovery. There can be no dispute as to the facts constituting contributory negligence. And, in our opinion, no reasonable inference can be drawn from them other than that plaintiff's negligence caused his own injury. In that case, the question of his negligence is one of law, to be determined by the courts. See 2 Thompson on Negligence, p. 1178, Sec. 25, p. 1236, Sec. 11, and cases cited.

A very few remarks will make plain our position, that no other inference can be drawn from the facts than that plaintiff's own negligence contributed to the injury. The train was going at "a pretty lively" speed. Plaintiff was encumbered by his lantern and prod-pole. As a passenger upon the train he had no right to go upon the freight cars, the "caboose" being provided for his accommodation. We think no ordinarily prudent man would attempt to do what plaintiff failed in doing, viz., to mount the freight car while it was going at the speed indicated, and at the same time holding in his hand a lantern and prod-pole. See *Bon v. The Railway Passenger Assurance Co.*, 56 Iowa, 664; *Doggett v. The Illinois Central Railway Co.*, 34 Iowa, 284.

We are not prepared to say that under all circumstances it would be negligence to go upon a moving train. The rate of speed might be so slow, the circumstances might be so favorable, and the person attempting it might be so unencumbered in his movements, that prudence would not forbid an attempt to enter a passenger train when in motion. In this case all of these circumstances are wanting. The plaintiff, in the night-time, with one hand filled with a lantern and prod-pole, attempted to climb upon the top of a freight car when its speed was so great and increasing that but a brief delay would render it unsafe to attempt to enter the caboose. In our opinion he was guilty of negligence amounting to recklessness, if not to madness.

Our conclusions are demanded in the interest of human life. No encouragement or countenance should be given by the law to such reckless disregard of life and personal safety as was exhibited by plaintiff. The adjudged cases will be found to give but little light upon the question involving the negligence of plaintiff. Each case is based upon its own peculiar facts. Those referred to by counsel need not, therefore, be cited. In our opinion, the dis-

strict court should have sustained defendant's motion to direct a verdict in its favor.

Reversed.

Getting Upon Moving Cars Amounts to Contributory Negligence.—The conduct of a passenger in running after or alongside of a train which has attained a considerable degree of speed, and attempting to climb on board of it, is such contributory negligence as will defeat an action for damages in case of injury. *Chicago & N. W. R. Co. v. Scates*, 90 Ill. 586; *Knight v. Pontchartrain R. Co.*, 23 La. Ann. 462; *Hubener v. New Orleans, etc., R. Co.*, 28 La. Ann. 492; *Phillips v. Rensselaer, etc., R. Co.*, 49 N. Y. 177; *Harper v. Erie R. Co.*, 32 N. J. L. 88; *Wabash, etc., R. R. Co. v. Rector*, 9 Am. & Eng. R. R. Cas. 264.

But see, *Johnson v. Westchester, etc., R. Co.*, 70 Pa. St. 357; *Swigert v. Hannibal & St. Joe R. R. Co.*, 75 Mo. 475, s. c. 9 Am. & Eng. R. R. Cas. 322; *Kelley v. Chicago, M. & St. P. R. Co.*, 2 Am. & Eng. R. R. Cas. 65.

CHICAGO, ST. LOUIS & NEW ORLEANS R. R. Co.

v.

TROTTER.

(61 *Mississippi Reports*, 417.)

In an action against a railroad company to recover damages for injuries sustained by a party who fell from the platform of a car which was standing at the depot, while attempting to enter the same as a passenger, it was error to instruct the jury that if the fall "could have been averted by the skill or care of the defendant or its servants, the plaintiff was entitled to recover."

APPEAL from the Circuit Court for Montgomery county.

The appellee, while attempting to enter a passenger coach of the appellant company in the night time, fell from the platform of the car and received injuries on account of which she brought suit and recovered a verdict for \$7,500. It was a starlight night in August. The natural light was sufficient to enable persons to move about in any direction without difficulty. There were no lights (lamps) on the platform of the depot, but the cars were as well lighted as passenger cars usually are. Other persons embarking at the same place and time with the appellee got on the train without difficulty. Appellee was an inexperienced country girl who had never been on a train before. She got upon the platform of the car in a crowd, having in her hands a fan and a parasol, and while there took from her father a large hand trunk. And thus incumbered, in the confusion and excitement, slipped or was pushed off of the platform on the side opposite the one she had ascended, and falling down an embankment of several feet dislocated and permanently injured her arm. The train was not in motion at the time of the accident.

On the trial the court gave among others the following instructions for the plaintiff:

"(8) The court instructs the jury that a railroad company, as common carrier of passengers, is required to have sufficient force of competent, skillful, and attentive servants to attend their trains with safety, and if the jury believe from the evidence that the plaintiff acted with ordinary prudence, and the injury could have been averted by skill or care of defendant or defendant's servants, then such want of skill or attention is negligence on the part of the defendant, and the jury will find for the plaintiff."

"(9) Railroad companies as common carriers of passengers are required to use the utmost care and skill for the preservation of the lives and limbs of all passengers; and the jury are authorized to consider in making up their verdict the character of the passenger, and if they believe from the evidence that plaintiff acted with ordinary prudence, and if they further believe from the evidence that the injury could have been averted or prevented by the exercise of skill and attention on the part of the defendants or their servants in receiving a female passenger on their trains, then the jury will find for the plaintiff."

The giving of these instructions is assigned for error.

W. P. & J. B. Harris, for the appellant.

Calhoon & Green, for the appellee.

CAMPBELL, C. J.—The eighth and ninth instructions for the appellee should not have been given. They announced that if the fall of the plaintiff could have been averted by the skill or care of the defendant or its servants the plaintiff was entitled to recover. This made the defendant responsible if by any precaution the mishap to the plaintiff might have been prevented, and although the jury was instructed at the instance of the defendant that it was not required of defendant to have persons at the entrance to the car to assist the plaintiff on and keep her from falling, it is manifest that the jury took license from the eighth and ninth instructions for the plaintiff to render a verdict which is clearly wrong. The evidence shows that the cars of the defendant were as well lighted as usual or necessary, and that the fall of the plaintiff was chargeable not to any want of facilities for a safe entrance to the car, but to the haste and excitement incident to her first experience in entering a railroad car, and a misstep consequent on her confusion in her new situation. The testimony fails to show any fault on the part of the appellant on the occasion of the mishap of the appellee, and it would be spoliation through the aid of the law to permit a recovery by the appellee for the consequence of her own want of experience and care when no blame is imputable to the appellant with respect to her misfortune.

The testimony strongly suggests that this was her own view of the matter when it occurred, and that the idea of receiving damages for it was a subsequent conception, and originated not with her, but another.

Judgment reversed and a new trial awarded.

SNOW

v.

FITCHBURG RAILROAD COMPANY.

(186 *Massachusetts Reports*, 552.)

A passenger on a steam railroad, who, while waiting in a proper place and using due care on the platform at a station of the railroad corporation, to make a necessary change from one train to another, is injured by being struck by a mail-bag thrown, in accordance with a custom known to the corporation, by a mail agent in the employ of the United States, from a mail-car belonging to the corporation on one of its express trains running at a high rate of speed, may maintain an action for such injury against the corporation.

TORT for personal injuries occasioned to the plaintiff by being struck by a mail-bag thrown by a mail agent in the employ of the United States, from a mail-car belonging to the defendant on one of its trains. Trial in the Superior Court, without a jury, before Staples, J., who found for the plaintiff; and the defendant alleged exceptions. The facts appear in the opinion.

W. S. Stearns, for the defendant.

J. T. Joslin (*G. A. King* with him), for the plaintiff.

COLBURN, J.—The plaintiff was a passenger on the railroad of the defendant, and properly on the platform at the station, waiting to make a necessary change from one train to another. There is no claim that she was in an improper place, or in any way wanting in due care. The plaintiff sustaining this relation to the defendant, and being in this place, the defendant was bound to exercise towards her such care and diligence as could reasonably be exercised to protect her from such injuries as human foresight could anticipate and prevent.

The defendant voluntarily furnished a car to run on its express train, from which it knew that mail-bags were to be thrown at the station where the plaintiff was when the train was under full speed. Obviously, unless good judgment and great care were used by the mail agent in throwing out the bags, which had the momentum of a train moving at the rate of thirty miles an hour, or forty-

four feet a second, danger was likely to result to passengers on the platform of the station.

There was evidence in the case tending to show that mail-bags had not unfrequently been thrown from this car in such a way as to strike upon the platform where the plaintiff stood; and if this evidence was believed the court was justified in inferring that the defendant knew, or, in the exercise of proper care, ought to have known this. It was within the power of the defendant to prevent this practice of throwing out mail-bags, if in no other way, by withholding the use of the car, or by stopping the train at the station. The case presented is unlike that of the act of a passenger, which the defendant had no reason to anticipate or power to prevent.

We are of opinion that the court was justified in refusing to rule, as requested by the defendant, that the plaintiff was not entitled to recover.

Exceptions overruled.

NEW YORK, LAKE ERIE & W. R. Co.

v.

SEYBOLT, Adm'r.

(51 *New York Reports*, 562.)

In an action by a mail agent against a railroad company, for injuries occasioned by the train on which he is traveling leaving the track and running into cars standing on a side-track, the proof of the above facts constitutes *prima facie* proof of the company's negligence.

The party upon whom rests the burden of proof in a civil action such as the above, is not bound to establish a case free from reasonable doubt; he performs his obligation by presenting a preponderance of evidence.

A railroad corporation owes the same degree of care to mail agents riding in postal cars in charge of the mails as they do to passengers.

A mail agent was killed by an accident on defendant's road. Upon the pass issued for its use by defendant was an indorsement by which it stipulated for an exemption from liability for damages on account of injuries occurring through its negligence. *Held* that, as the authority of the government agents to contract for the transportation of mails is limited by the provisions of the United States Statutes, and as no power is given them to contract for exemption to a railroad corporation from liability for such a cause of action, it was not to be assumed that the contract under which defendant carried the mails contained any such provision; that if the contract between the government and defendant contained such a provision it was unauthorized and void; that, assuming the decedent received the pass and was chargeable with knowledge of its contents, it did not constitute a contract between him and defendant; that, as the absolute duty of carrying the agent in charge of the mail is imposed by said statutes upon the railroad corporation accepting the public mail for transportation, the defendant had no right to impose the condition; the agent's acceptance of the pass did

not indicate his intention to assent to its provisions, and even if it might be so construed, and if the exemption clause was to be considered as a contract, it was void for want of consideration.

APPEAL from judgment of the general term of the Supreme Court, in the second judicial department.

Lewis E. Carr, for appellant.

J. F. Seybolt, for respondent.

RUGER, C. J.—The cause of the accident whereby the plaintiff's intestate lost his life was left in some doubt by the testimony, and was altogether a matter of inference for the jury to draw from the circumstances appearing in evidence relating thereto.

No direct evidence was given on the subject by either party, the defendant seeking to establish the inference that it was occasioned by the breaking of an axle by proving from the evidence of its employes and others that the axle of the engine was found broken after the accident, and that its switches were properly set; that the road-bed and machinery of the train were of sound material, in good order and condition, and that the train was carefully and skillfully managed; and the plaintiff, from the nature of the accident, the results produced and the circumstances surrounding it, that it was occasioned by the negligence of the defendant's servants in setting the switches at the place of accident, whereby the train was diverted from the main track and brought in collision with obstructions on a side-track, which produced the injury complained of. It was undisputed in the case that the casualty occurred in the immediate vicinity of the switch; that the cars left the main track following either upon or in the general line of the side-track leading from the switch; that they came in collision with cars standing on the side-track at a distance of several hundred feet from the switch, and that the proximate cause of the destruction of the mail-car was the collision between the train and the cars standing on the side-track. These circumstances afforded a strong presumption that the train was diverted from the main track by some disarrangement of the switch. No adequate cause for the various circumstances appeared in evidence except that afforded by the presumption of a misplaced switch.

Notwithstanding the positive evidence of witnesses to the effect that, at different times during the few hours preceding this accident, they had examined these switches and found them properly set and locked, there was sufficient evidence, derivable from the undisputed facts, and the conflicting statements as to the situation of the connecting rails of the side-track after the accident, to afford a support for the inference, probably drawn by the jury, that the accident was caused by a misplacement of one or both of the switches. There was evidence tending to show that the mail-

car was thrown from the side-track a distance from thirty to fifty feet down an embankment, and was found to be lying nearly abreast of the engine at right angles with it and on fire immediately after the accident occurred. The situation, not only of this car, but that of the baggage and smoking cars attached to it, was such that it could not probably have been produced except by a collision between a train moving with considerable velocity upon a clear track and a body offering great resistance.

From these facts the jury might very well have concluded that the evidence which attempted to account for the accident upon the theory that the train left the track near the upper switch in consequence of a broken axle, involving as it did the proposition that it must have run nearly four hundred feet over railroad ties and other obstructions before colliding with the cars standing on the side-track, was quite improbable, and did not sufficiently account for the results disclosed by other undisputed evidence. There was evidence to support the finding of the jury upon the question of the defendant's negligence, and we see no ground upon which to interfere with the conclusions reached.

At the close of the case the defendant requested an instruction to the jury that "the burden of proof is on the plaintiff to establish the negligence of the defendant. If there is a reasonable doubt on the whole evidence as to the negligence of the defendant, the verdict should be for the defendant." We think the court committed no error in refusing to charge as requested. While it is true as a general proposition that the burden of showing negligence on the part of the defendant occasioning an injury, rests in the first instance upon the plaintiff, yet in an action of this character, when he has shown a situation which could not have been produced except by the operation of abnormal causes, the onus then rests upon the defendant to prove that the injury was caused without his fault. *Caldwell v. N. J. Steamboat Co.*, 47 N. Y. 291; *Edgerton v. N. Y. & Harlem R. R. Co.*, 39 *id.* 227; *Curtis v. R. & Syracuse R. R. Co.*, 18 *id.* 534. It was said by Judge Grover in the *Edgerton* case, "whenever a car or train leaves the track it proves that either the track or machinery, or some portion thereof, is not in a proper condition, or that the machinery is not properly operated, and presumptively proves that the defendant, whose duty it is to keep the track and machinery in the proper condition and to operate it with the necessary prudence and care, has in some respect violated his duty." "The court charged that the defendant was bound to show and give some explanation of the cause of the accident. This portion of the charge must be understood in reference to the facts of this case and as applied to such facts. In this view it was not erroneous." See also *The J. Russell Mfg. Co. v. New Haven Steamboat Co.*, 50 N. Y. 121; *Mullen v. St. John*, 57 *id.* 572; *Ginna v.*

Second Avenue R. R. Co., 67 *id.* 597. When this request was made the evidence had clearly raised a presumption of negligence against the defendant, and the only question relating thereto which remained for the jury to consider was whether this presumption had been sufficiently negatived by the evidence introduced by the defendant. Under the authorities cited it would not have been error even if the court had charged that the plaintiff had established a *prima facie* case, and the burden of explaining the cause of the accident then rested upon the defendant.

The request must be considered with reference to all the facts appearing in the case at the time it was made, and as applied to them we do not think the defendant was entitled to the charge requested.

This request was also properly denied for the reason that it was coupled with the proposition that the jury should find for the defendant if they entertained a reasonable doubt upon the whole evidence as to the negligence of the defendant.

We are not aware of any rule applicable to the trial of issues of fact in civil actions which requires a party upon whom the burden of proof rests to establish a case free from reasonable doubt. In criminal cases, the law, out of tender regard for the rights of accused persons, and the presumption of innocence which always attaches to persons in that situation, gives to the defendant the benefit of any reasonable doubt existing as to his guilt; but in civil actions, unless the issue involves the commission of a crime by some of the parties thereto, the application of such a rule is, we think, unauthorized by the law of evidence. It was held, in the case of *Johnson v. Agricultural Insurance Company* (25 Hun, 251), where the defendant had, in answer to an action upon a policy of insurance to recover damages for a loss occasioned by fire, alleged that the plaintiff had himself fired the insured buildings; that it was sufficient if the defense was supported by a preponderance of evidence, and that it was error to require the defense to be proved beyond a reasonable doubt. The question decided in that case has been the subject of considerable controversy among authors upon evidence, and we do not intend to express any opinion thereon; but we apprehend that the case suggested presents the only exception, if any exists to the rule, that upon the trial of a civil action the party sustaining the burden of proof performs his obligation by presenting a preponderance of evidence. The rule is concisely stated in 3 Greenleaf's Evidence, Sec. 29, as follows: "A distinction is to be noted between civil and criminal cases in respect to the degree or quantity of evidence necessary to justify the jury in finding their verdict for the government. In civil cases their duty is to weigh the evidence carefully and to find for the party in whose favor the evidence preponderates, although it be not free from reasonable doubt. But

in criminal cases the party accused is entitled to the benefit of the legal presumption in favor of innocence, which in doubtful cases is always sufficient to turn the scale in his favor."

The exceptions taken to the ruling of the court in holding that the defendant owed the same degree of care to the clerks and mail agents riding in the postal car, in charge of the mails, as they did to passengers riding upon the train, were not well founded. The question was decided in the case of *Nolton v. Western Railway Company*, 15 N. Y. 444, and *Blair v. Erie Railway Co.*, 66 *id.* 313, and we see no reason for questioning the correctness of the disposition then made of the question. The opinion in the case of *Pennsylvania Railroad Company v. Price*, 96 Penn. St. 256, s. c. 1 Am. & Eng. R. R. Cas. 234, not only does not conflict with the doctrine of these cases, but cites with approval the *Nolton Case*. The question in that case was upon the construction to be given to the word "passenger," as used in the act of 4th of April, 1868, Pamph. L., p. 58, of the Laws of Pennsylvania; and it was held, from the language employed in the act, that the legislature intended to exclude postal agents from the class therein designated as passengers, and that they were thereby placed on the same footing as the employes of the company in respect to their rights of action against the company for injury occasioned by negligence.

The question arising over the indorsement on the back of the pass issued by the defendant for the use of the mail agent, whereby it stipulated for an exemption from liability for damages on account of injuries occurring through its negligence, is the only one remaining which requires notice. The defendant's requests to charge upon this subject were based upon the assumption that this indorsement alone, accompanied by proof of its delivery, evidenced a contract binding upon the person using the pass. There was no request made to have this question submitted to the jury, neither was there a finding as to the terms of the contract under which the deceased was carried at the time of his death. No attempt was made by the defendant to prove an express contract between itself and the government for carrying the mails, except that sought to be inferred from the indorsement on the pass; and this, if any proof of a contract, referred only to one of the incidents of the general arrangement under which their service was performed for the government.

The evidence showed that the defendant had been engaged for a long time in transporting the mails, but whether this service was performed under an express or an implied contract between the parties did not appear. In either event we are authorized to assume that the contract under which such service was performed did not contain any provision which the government agents were unauthorized by the statute to make. The provisions relating

thereto are embraced in Sec. 3997 to 4005, both inclusive, of Chap. 10 of the title 46 of the Revised Statutes of the United States. Sec. 4000 of this chapter reads as follows: "Every railway company carrying the mail shall carry on a train which may run over its road, and without extra charge therefor, all mailable matter directed to be carried thereon, with the person in charge of the same."

The compensation for the services rendered by a railroad company in such transportation is provided for by other sections of the statute, and is graduated by the quantity of the matter carried and the distance over which it is transported, and this compensation is thereby placed beyond the authority of any agent of the government to vary or diminish. The authority of its agent to contract on its behalf for the transportation of the mails is limited by the provisions of the statute, and no power is thereby given to stipulate for any advantage to it, as a consideration for exemption to a railroad corporation of liability from causes of action accruing through its negligence. Indeed, it would be a strange proposition to say that one government agent can barter away the individual rights of another, as a consideration for some benefit to be derived by his principal therefrom. Certainly such a power cannot be supposed to exist except by force of an express statute or voluntary consent of the parties to be affected thereby. It seems to follow that, even if there had been an express contract between the government and the defendant, providing for the exemption in question, it must have been void, in respect to such a provision, for want of authority in the officer representing the government to make it. Such officer, acting under the power contained in the statute, could not lawfully represent the government in making such a contract, and he could represent the person subjected to the risks of such negligence only by virtue of express authority conferred upon him by such person.

It appeared on the trial that it was the custom of one of the superintendents of the government mail service to issue a monthly requisition upon the defendant for passes over its road for the use of the persons traveling in charge of the mails, and that this was done for the month of January, 1881, and the pass in question was accordingly issued by the defendant and delivered to such superintendent for the use of the plaintiff's intestate during that month. This pass was sent by the superintendent to the deceased, but whether it reached him or not does not appear. Upon the back of the pass was printed the following condition: "The person accepting this free pass assumes, in consideration therefor, all risk of accident, and expressly agrees that the New York, Lake Erie & Western Railroad Company shall not be liable under any circumstances, whether of negligence by their agents or otherwise, for any injury to the person or for any loss or

injury to the property of the passenger using this pass." Assuming, for the purpose of argument, that the mail agent received the pass, and was chargeable with knowledge of its contents, the question is presented as to the effect, if any, which it had upon his rights.

It cannot now be disputed that an individual transported over the route of a carrier of passengers may debar himself, by a contract founded upon a sufficient consideration, from any claim to damages for injuries to his person or property occasioned by the negligence of such corporation during the course of transportation. Such a contract, however, to be binding upon a party, must be made by him or by some one authorized to act in his behalf. Such authority may sometimes be implied from certain contract relations existing between the parties, as between master and servant, or principal and agent; but no such implication can arise when the relations of the parties are regulated and defined by statute. *Stinson v. N. Y. C. R. R. Co.*, 32 N. Y. 333; *Blair v. Erie Railway Co.*, *supra*.

We think, under the circumstances presented by the case, that this pass was a mere voucher, issued for the convenience of the agent and the information of the employés of the defendant, and did not in any sense constitute a contract between the defendant and the person using it. It was not delivered in accordance with any negotiation had or contract made at the time of its issue, but was obviously employed from time to time, as the necessity for it arose, to carry out some pre-existing arrangement made between the defendant and the government in relation to the transportation of the mails and the persons having them in charge.

The principle involved in the cases holding that a party making a contract with a common carrier—who voluntarily accepts a ticket or receipt purporting to contain the conditions of the contract for the transportation of persons or property—is thereby deemed to have assented to such conditions, has no application to this case. These cases proceed upon the assumption that the rights of the parties are founded upon an express contract assented to by the respective contracting parties, and the presumed intent and understanding of the parties that such contract was made and perfected at the time of the payment of the consideration and the delivery of a voucher therefor stating the conditions upon which it was received. In this case, however, the rights which could be made the subject of contract stipulations between the several parties were limited by the statute, and certainly one of those parties had no reason to suppose that he was monthly making a contract which affected in any degree his right of transportation over the defendant's road, which had already been secured to him by law. The absolute duty of providing a car for the transportation of the mail, and of carrying such mail and the persons in

charge thereof, is imposed by the statute, and an imperative obligation for its performance rests upon the corporation accepting the public mails for the purpose of transportation. An attempt by such a corporation to impose any other conditions upon the performance of this service than those provided by the statute would be illegal and ineffectual to shield it from the consequences of its wrongful acts.

It is not claimed that the superintendent of the railroad mail service, to whom this pass was delivered, had authority to enter into any contract on behalf of the government. Neither is it claimed that any contract has been made by the defendant with any other officer of the government exempting it from liability for injuries sustained by mail agents on account of its negligence.

This defence must, therefore, rest upon the proposition that a person to whom is secured an absolute statutory right to transportation over a railroad, forfeits his right to damages for an injury inflicted upon him through the negligence of such railroad corporation, by the involuntary acceptance of a voucher containing provisions intended by the corporation to exempt it from liability for its negligence, although the person receiving it supposed it was intended solely to facilitate the enjoyment of his right of transportation.

We are of the opinion that the agent's acceptance of the pass under the circumstances of this case did not indicate an intention to assent to the provisions therein contained, and even if it might be so construed, that the want of a consideration for such an agreement rendered it *nudum pactum*. A promise by one party to do that which he is already under a legal obligation to perform has frequently been held to be insufficient as a consideration to support a contract. *Vanderbilt v. Schreyer*, 91 N. Y. 392.

We are, therefore, of the opinion that the judgment should be affirmed.

All concur.

Judgment affirmed.

Mail Agents are Passengers.—A mail agent riding in a railroad train is not strictly speaking a passenger. *Pennsylvania R. R. Co. v. Price*, 1 Am. & Eng. R. R. Cas. 234. But he may recover damages for an injury occasioned by the company's negligence on the ground of a breach of the company's duty towards him. *Collett v. London, etc., R. Co.*, 20 L. J. (Q. B.) 411; *Nolton v. Western R. Corp.*, 15 N. Y. 444; *Hammond v. North-Eastern R. Co.*, 6 S. C. 130. The law is the same as to express messengers. *Blair v. Erie R. Co.*, 66 N. Y. 313; *Yeomans v. Contra Costa Steam Nav. Co.*, 44 Cal. 71.

Occurrence of Accident to Passenger Constitutes *Prima Facie* Presumption of Negligence.—Ordinarily, where an injury is done to a passenger which is occasioned by an accident to the train, which could not have been produced except by the operation of abnormal causes, proof of the accident constitutes of itself a *prima facie* presumption of negligence. Rail-

road Co. v. Pollard, 22 Wall. 841; Bowen v. New York, etc., R. R. Co., 18 N. Y. 408; Sawyer v. Hannibal & St. Jos. R. Co., 87 Mo. 240; Walker v. Erie R. Co., 68 Barb. 260; Meier v. Pennsylvania R. R. Co., 64 Pa. St. 225; Toledo, etc., R. R. Co. v. Beggs, 85 Ill. 80; Curtis v. Rochester, etc., R. Co., 18 N. Y. 534; Edgerton v. New York & Harlem River R. Co., 89 N. Y. 227; Galena, etc., R. Co. v. Yarwood, 17 Ill. 509; George v. St. L., I. M. & R. Co., 1 Am. & Eng. R. R. Cas. 294; Iron R. R. Co. v. Mowbry, 3 Am. & Eng. R. R. Cas. 361; Cleveland, etc., R. Co. v. Newell, 8 Am. & Eng. R. R. Cas. 377; Smith v. St. Paul City R. Co., 16 Am. & Eng. R. R. Cas. 310.

It is particularly clear that when a passenger is injured by a train running off the track, evidence of the occurrence constitutes *prima facie* evidence of negligence. Carpus v. London, etc., R. Co., 5 Q. B. 749; Pittsburgh, etc., R. R. Co. v. Thompson, 56 Ill. 188; Yonge v. Kinney, 28 Ga. 111; Zemp v. Railroad Co., 9 Rich. L. 84; Dawson v. Manchester, etc., R. Co., 7 H. & N. 1087; Edgerton v. N. Y., etc., R. R. Co., 85 Barb. 389; Sullivan v. Philadelphia, etc., R. R. Co., 30 Pa. St. 234; Pittsburgh, etc., R. Co. v. Williams, 8 Am. & Eng. R. R. Cas. 457; Cleveland, etc., R. R. Co. v. Newell, 8 Am. & Eng. R. R. Cas. 488; New York, etc., R. R. Co. v. Daugherty, 6 Am. & Eng. R. R. Cas. 189; Phila. & B. R. R. Co. v. Anderson, 6 Am. & Eng. R. R. Cas. 407; Little Rock & Ft. Smith R. R. Co. v. Miles, 13 Am. & Eng. R. R. Cas. 10.

Obligation of Railroad Company to Passenger Riding on Free Pass.—Where a person is riding in a railroad train upon a free pass, the company is bound to exercise as to him the same measure of care which it is bound to exercise as to passengers paying full fare. Todd v. Old Colony R. Co., 3 Allen, 18; s. c. 7 Allen, 207; Phila. & Reading R. R. Co. v. Derby, 14 How. (U. S.) 468; Jacobus v. St. Paul, etc., R. Co., 20 Minn. 125; Rose v. Des Moines Valley R. Co., 39 Iowa, 246; Austin v. Great Western R. Co., 3 Best & S. 327. But see, *contra*, Kinney v. Central R. R. Co., 34 N. J. L. 513.

Railroad Company Cannot in Free Pass Exempt Itself from Liability for Negligence.—A carrier cannot, in giving a free pass, stipulate for exemption from liability for an injury occasioned by its own negligence. Knowlton v. Erie R. Co., 19 Ohio St. 260; Indiana, etc., R. Co. v. Mundy, 21 Ind. 48; Jacobus v. St. Paul, etc., R. Co., 20 Minn. 125; Lackawanna, etc., R. Co. v. Chonewith, 52 Pa. St. 382; Rose v. Des Moines Valley, etc., R. R. Co., 39 Iowa, 246; Railway Co. v. Stevens, 95 U. S. 655; Buffalo, etc., R. R. Co. v. O'Hara, 9 Am. & Eng. R. R. Cas. 317; Kimball v. Boston, Concord & Montreal R. R. Co., 13 Am. & Eng. R. R. Cas. 55. Some cases are to the contrary effect. Kinney v. Central R. R. Co., 34 N. J. L. 513; Wells v. New York, etc., R. R. Co., 24 N. Y. 181; Bissell v. New York, etc., R. Co., 25 N. Y., 442; Knowlton v. Erie R. Co., 19 Ohio St. 260; McCaley v. Furness R. Co., L. R. 8 Q. B. 57; Gallin v. London, etc., R. Co., L. R. 10 Q. B. 212.

But at any rate the carrier cannot exempt himself from liability for gross negligence on his part. Penna. R. Co. v. McCloskey's Adm'r, 23 Pa. St. 526; Illinois, etc., R. R. Co. v. Reed, 37 Ill. 484; Arnold v. Illinois, etc., R. R. Co., 38 Ill. 278; Toledo, etc., R. Co. v. Beggs, 85 Ill. 80; Indiana, etc., R. Co., v. Mundy, 21 Ind. 18.

GARDNER

v.

NEW HAVEN & NORTHAMPTON COMPANY.

(51 Connecticut Reports, 143.)

The plaintiff desired to procure the transportation of a horse in his charge by the defendant's railroad, and applied to A. who had several horses to go by the same train, to take his with his own and have them billed together

in A.'s name. This was done. A printed rule of the company provided that only one person should go free with stock, and on A.'s stating to the defendant's agent that there might be another man to go with him the latter replied that he would have to pay fare. A. did not mention the plaintiff's name, and the company had no other knowledge of his intention to go by the train. He assisted A. to get the horses on board and intended to get a ticket, but had no time, and expected to pay his fare when called upon by the conductor. The train was a freight one. On the passage, and before the plaintiff had paid any fare, the train was run into by another through the negligence of the defendant, and the plaintiff injured. *Held*, that the defendant was not liable.

The intention of the plaintiff to pay his fare, and his good faith in the whole matter, were immaterial. The company had no knowledge of it, and came into no contract relation with him.

ACTION to recover for an injury received by the plaintiff while traveling in the cars of the defendant, a railroad company; brought to the Superior Court. The case was heard in damages after demurrer overruled by Andrews, J., and the following facts found:

The defendant is a common carrier of passengers and merchandise from Turner's Falls through the towns of Northampton and Westfield, in the State of Massachusetts, to New Haven, in Connecticut, having regular trains for passengers and other trains for the carriage of freight. On the 14th of October, 1881, John O. Avery bargained with the defendant to transport eight horses from Northampton to Harlem River in the State of New York. One of these horses was not owned by Avery, but by the Rev. Dr. Gardner, of New York city, a brother of the plaintiff. This horse was in the care of the plaintiff, who was taking it to New York. A few days before this the plaintiff, knowing that Avery was about to take some horses to New York, applied to him to procure transportation for this horse along with his, and for the plaintiff to go in the car with the horse to take care of him. Avery engaged cars for the horses a day or two before the 14th, at which time the defendant's agent made known to him their rates and rules for the transportation of live stock and for persons going in the car to take care of it. Among these rules were the following:

"4. Owners are to load, unload and feed, at their own risk and expense, and assume all risk of damage that animals may cause to each other or themselves, and all damage in consequence of their breaking from the cars. No risk will be assumed by the railroad companies, nor damage allowed, unless specially agreed to when the animals are taken for transportation and an additional price paid.

"5. One person will be allowed to pass free when accompanying his stock to take care of it and paying the price for not less than 9,000 lbs.; and in no case will he be allowed to ride free on a passenger train."

At this interview Avery said to the defendant's agent that there might be another man to go with him, to which the agent replied: "Then one of you will have to pay fare." Avery had reference to the plaintiff, but he did not so state to the agent, nor did he inform him that he was not the owner of all the horses. The horses were put upon the defendant's cars—six in one car and two in another—at Northampton, on the morning of October 14th, the plaintiff being in company with Avery and assisting. They were delayed in the loading so long that the plaintiff did not have time to procure a ticket before the train started. He entered one of the cars with Avery to look after the horse of which he was in charge, expecting to pay his fare to the conductor when it should be demanded. At Westfield these cars were placed on a side-track to wait for the coming of the through train to New York, and while standing on the side-track they were violently run into by other cars of the defendant, causing the injury to the plaintiff of which he complains. The defendant was negligent and careless in so doing. There was no agreement or understanding between the plaintiff and the defendant other than is herein stated.

At the hearing the plaintiff introduced evidence in chief only as to the extent of his injury. Upon cross-examination of the plaintiff in this part of the case the defendant called out from him the facts in regard to his arrangement with Avery substantially as hereinbefore set forth, and also the fact that he had no ticket when he entered the car. After the defendant had rested the plaintiff called Avery in reply, who testified as follows: "I shipped these horses; I did not own them all; a few days before the 14th I spoke to the agent at Northampton for cars sufficient to take six or eight horses to New York; I asked him how much it would be; he read me their rules as to rates and also their rules as to any one going in the car free. I said I thought there would be another man to go with me; the agent then read the rule respecting a man going free to take care of his stock, and said that if there was more than one man one would have to pay fare. I said, 'Can you give me a pass?' He said he had no authority to give one. When I took the horses there Gardner was with me; we had but little time to load them before the cars started. I went in and paid the freight; I paid on all the horses and the wagon; I got a receipt. After I came out Gardner said he must go and pay the freight on his horse; I told him I had paid it along with mine."

Avery was going on to state the arrangement between himself and the plaintiff pursuant to which he had engaged the transportation for the plaintiff's horse, and had stated that the plaintiff had requested him so to do. The plaintiff's counsel asked him, "Did Gardner say anything more?" The witness answered:—"He said that he wanted to go down in the car with the horse,

as his brother had requested him to come down and take care of the horse." The question was then asked: "Did Gardner say anything before the train started about the payment of his fare; and if so, what?" The witness answered: "Just as the train was about to start Gardner said he must go and pay the freight on his horse; I said I had paid it at the same time I paid mine. He then said, 'Let me pay you.' I said, 'Let it go till we are on the car.' He then said, 'Hadn't I better go and get a ticket?' I said, 'You will not have time now to go to the passenger depot and get back; you can pay the conductor on the train when he demands it.' The engine had backed down at that time and the train was just about to start." All these questions and answers were objected to, but the court, for the purpose of showing the good faith of the plaintiff, admitted them.

The court assessed the damages at \$1,000, and the defendant appealed to this court, assigning as errors that the damages should have been only nominal, and that the evidence admitted by the court was inadmissible.

W. C. Case, for the appellant.

C. R. Ingersoll and *W. B. Stoddard*, for the appellee.

GRANGER, J.—This is an action brought by the plaintiff to recover damages for an injury received by him while upon the cars of the defendant, a railroad corporation and common carrier of freight and passengers. The superior court upon demurrer overruled, and a hearing in damages rendered judgment for the plaintiff to recover \$1,000 damages. The defendant appeals, and the case is before this court upon that appeal.

Two reasons of appeal are assigned.

1st. Because upon the facts found by the court the plaintiff was at the time of the accident a trespasser on one of the defendant's freight trains, upon which no passengers were transported, and seeking to obtain a passage on the road without the consent or knowledge of the defendant and without payment therefor; and that he is therefore not entitled to recover for the damage which he claims to have received.

2d. That certain questions and answers (stated in the finding) were inadmissible, and that the court erred in receiving them.

The whole controversy in the case depends upon this question—was there any contract relation, express or implied, between the plaintiff and the defendant in this case; or, in other words, was the plaintiff a passenger according to the legal meaning of the term on the defendant's road at the time the accident happened?

We have no hesitation in answering this question in the negative, and in saying that the defendant, under the facts disclosed in the finding, was not liable for more than nominal damages. The plaintiff was in no legal sense a passenger on the road, but

was in the car at the time without the consent or knowledge of the defendant. This clearly appears from the facts disclosed. The train upon which he was injured was, so far as the case shows, exclusively a freight train; there was no passenger car attached, and no invitation to the plaintiff nor to the public to take passage upon it. The plaintiff paid no fare, and whether he intended to pay or not when called upon is of no consequence, so that his good or bad faith in taking his place on the car among the horses is quite immaterial. He had no business to be there without the consent of the defendant, and he had no rights except that of immunity from wilful and wanton injury common to all citizens. Railroad companies have the clear and undoubted right to make rules and regulations that are reasonable and proper for the running of their trains. It would be impossible to conduct their vast business otherwise. If a person desires to be transported as a passenger he must comply with the rules of the company in regard to payment of fare and conduct while on the train, and all other reasonable requirements of the company. If a person desires to have his goods transported he must in like manner comply with the rules of the company in relation to all matters appertaining to the shipment, transfer and delivery of the goods transported. The whole duty of the company towards shipper or passenger is a duty resting entirely upon contract, express or implied.

Now what was the contract duty of the defendant towards this plaintiff? Was there any? What are the facts? The plaintiff really had no transaction whatever with the defendant. He bought no ticket, paid no freight, in no way made himself known to the company or any of its agents or employes, either as passenger, shipper, or custodian of any of the horses which had been shipped by Avery. This person, it seems, on the 14th of October, 1881, contracted with the defendant corporation to transport eight horses from Huntington, Massachusetts, to Harlem River or New York. Avery owned but seven of these horses; one belonged to a brother of the plaintiff, Rev. Dr. Gardner of New York. The plaintiff had the custody of this horse. Avery was applied to by him prior to October 14th to permit this horse to go along with his horses under the same way-bill and to permit the plaintiff to accompany it. Avery engaged cars of the defendant for the eight horses a day or two before the 14th, at which time he was fully informed by the defendant of its rates and rules for the transportation of live stock. One of these rules was that "one person will be allowed to pass free when accompanying his stock to take care of it and paying the price for not less than 9,000 pounds, and in no case will he be allowed to ride free on a passenger train."

At this time Avery said to the defendant's agent that there

might be another man to go with him, and he was told by the agent distinctly that one of them would have to pay fare. Avery at this time made no mention of the plaintiff and did not disclose the fact that he was not the owner of all the eight horses. The name and existence of the plaintiff, the fact that he had any interest in one of the horses, or that he intended to accompany Avery, was studiously or otherwise concealed from the defendant. Avery, in this transaction, must be held to be the agent of the plaintiff, and must be presumed to have communicated to him the terms upon which the animals were shipped; if not, the plaintiff was bound to ascertain for himself, before he started upon the train with the horses, whether or not he had a right to be there. The defendant concealed nothing; the rules and regulations were known and read of all men who had dealings with the company, or might have been, and it would have been very easy for the plaintiff to place himself in a correct position in relation to the company; but the facts all show that he was in a false position, and whether he intended to go on the train as a stow-away or not is, as we have said, immaterial.

An excuse, or something in its nature, is claimed by the plaintiff for his non-payment of fare. It is said that there was not time for him to procure a ticket after the horses were loaded, and that he was expecting to pay his fare when the conductor called for it. But the case does not show that it was the custom of conductors, or their duty on a train of this character, to call for fares or tickets; for aught that appears it was a stock train without any passenger car attached, while it also appears that the plaintiff was in one of the cars with the horses. It will be remembered that the rules of the company permitted one person to ride in the car with his stock to look after and take care of it, and it is a reasonable presumption that the conductor was not expected to go through the stock car for the purpose of collecting fare or taking up tickets. It is a place where passengers would not be likely to ride unless the safety of their stock required it, or unless their intent was to secure a free ride.

The plaintiff then, of his own motion, placed himself in this car with the horses without the consent or knowledge of the defendant, and against the rules of the company as to payment of fare. He well knew, or had the means of knowing, that he had no right there as a passenger, and he also knew, or ought to have known, that it was a place of extra hazard—a car loaded with horses being, in case of collision or any serious accident, anything but a safe or desirable place for a passenger. Whatever injury the plaintiff received we think, therefore, must be attributed to his own neglect or misconduct in placing himself in a position of peril without any expressed or implied assent on the part of the defendant.

The question as to the admissibility of the evidence objected to is substantially disposed of by the foregoing considerations. The intention of the plaintiff to pay his fare if demanded under the facts found was immaterial; his intent could not change the position of the defendant, or make it liable *ex contractu*. If he had actually paid his fare the case would present an entirely different aspect, but as the facts now stand he has no claim for more than nominal damages.

There is manifest error in the judgment complained of, and it is reversed.

Party Having Drover's Pass is Passenger for Hire.—A person traveling in the cars of a railroad company upon a drover's pass is not a gratuitous passenger, and the company is liable to him as a passenger for hire. *Railroad Co. v. Lockwood*, 17 Wall. 357; *Pennsylvania R. R. Co. v. Henderson*, 51 Pa. St. 315; *Cleveland, etc., R. R. Co. v. Curran*, 19 Ohio St. 1; *Graham v. Pacific R. Co.*, 66 Mo. 536; *Ohio, etc., R. R. Co. v. Selby*, 47 Ind. 471; *Flinn v. Phila., etc., R. R. Co.*, 1 Houst. (Del.) 469; *Smith v. New York, etc., R. Co.*, 24 N. Y. 222; *Indianapolis, etc., R. Co. v. Beaver*, 41 Ind. 498; *Little Rock & Ft. Smith R. Co. v. Miles*, 13 Am. & Eng. R. R. Cas. 10.

Company does not owe Duty to Trespassers as Passengers.—A railroad company does not owe the duty of a carrier to trespassers upon its trains, as it has entered into no contract relations with them for transportation. *Toledo, etc., R. Co. v. Brooks*, 81 Ill. 245; *Brown v. Missouri, etc., R. Co.*, 64 Mo. 536; *Chicago, etc., R. Co. v. Michie*, 83 Ill. 427; *Toledo, etc. R. Co. v. Beggs*, 85 Ill. 80; *Duff v. Allegheny V. R. R. Co.*, 2 Am. & Eng. R. R. Cas. 1.

MITCHELL

v.

CHICAGO & GRAND TRUNK RAILWAY COMPANY.

(81 *Michigan Reports*, 286.)

A train approaching a station where there was a crossing of railway tracks stopped, as required by law, several hundred feet from the crossing before proceeding to cross the track. The name of the station had just been called, and a woman passenger hurried to the door to alight. The train was not at the proper point for landing passengers, and as she climbed down it started to go on to the depot platform, and she fell and broke her ankle. The conductor and brakemen did not know she had left her place in the car, and it did not appear that anything was done that was out of the usual course. The accident happened by daylight. *Held*, that the injury to the passenger was purely accidental, unless the passenger was herself negligent, and that the company was not liable.

ERROR to Ingham.

Case. Defendant brings error. Reversed.

M. V. & R. A. Montgomery, for appellant.

A trainman's announcement of a station does not amount to an invitation to alight from a train. *Bridges v. N. L. R. W. Co.*, L.

R. 6 Q. B. 377, 7 H. L. 213; *Weller v. R. W. Co.*, L. R. 9 C. P. 126; *Cockle v. L. & S. E. R. W. Co.*, L. R. 5 C. P. 457; *Lewis v. L. C. & D. R. W. Co.*, L. R. 9 Q. B. 66. It is only a notice that a train is approaching a station, and to the passengers to be getting themselves ready to alight when the station is reached. *Weller v. L. B. & S. C. Ry. Co.*, L. R. 9 C. P. 126. One who has by his own negligence so far contributed to the injury done him that he might by the use of ordinary diligence or care have avoided it, has no right of action. *Michigan Central R. R. v. Leahy*, 10 Mich. 198; *Det. & Mil. R. R. v. Van Steinburg*, 17 Mich. 127; *Lake Shore & Mich. Southern Rd. v. Miller*, 25 Mich. 279; *Mich. Cent. R. R. v. Coleman*, 28 Mich. 452; *Mich. Cent. R. R. v. Campau*, 35 Mich. 471; *Swoboda v. Ward*, 40 Mich. 424; *Downey v. Hendrie*, 46 Mich. 501; *Hassenyer v. Mich. Cent. R. R.*, 48 Mich. 209.

J. C. Shields and *H. P. Henderson*, for appellee.

A railway passenger is justified in trying to leave a car as soon as it stops after the station is called. *Wood v. Lake Shore & Michigan Southern Ry.*, 49 Mich. 370, s. c. 8 Am. & Eng. R. R. Cas. 478; *Bridges v. Railway Co.*, L. R. 6 Q. B. 377; *Taber v. D. L. & W. R. R.*, 71 N. Y. 489.

CAMPBELL, J.—Plaintiff sued for a personal injury which befell her on leaving a train at the Chicago junction of defendant with the Detroit, Lansing & Northern Railroad, three miles east of Lansing. She had been traveling on defendant's road with a ticket which went to Lansing from Chicago, and had a coupon attached to take her on the other road from Lansing to Fowlerville. As the ordinary stoppage at the depot of defendant's road in Lansing would make it necessary for her to cross over a considerable distance to the other station in Lansing, the conductor offered to take her to the junction where the two roads met, so that there need be no difficulty in the transfer.

Just before arriving at the junction, and when the train was some 300 or 400 feet from it, the name of the station was called out by the proper person, and the cars came to a full stop, as required by law before reaching crossings. Plaintiff at once left her seat and hurried to leave the car. It does not appear that any person employed on the train noticed her. She went down the steps, where there was no platform or other convenience for landing, and just as she stepped off the cars were suddenly started again to go forward to the depot, and she fell and broke her ankle. When the depot was reached the conductor came in to help her out, and finding she was not in the car backed down and picked her up and took her to Lansing, where she was treated by a surgeon and went home that evening, and was confined to her bed and house some weeks while recovering. The accident happened early in the morning, during daylight.

The defense asked the court to take the case from the jury, which was refused, and a verdict was found in plaintiff's favor.

Upon the argument in this court the defense was rested on the absence of proof of negligence. While there was some evidence tending to prove contributory negligence in plaintiff, it was not urged that on that point there was not evidence for the jury.

It has been held in some States that in cases of injury on railroads there is always a presumption of negligence against the defendant. That, however, is not the common law, and is not the law of this State. According to the doctrine which we follow, negligence must be shown in all such cases, and it must appear to have been the efficient cause of the injury without contributory fault in the plaintiff. *Chicago & N. W. Ry. Co. v. Smith*, 46 Mich. 504; *Brown v. Congress & Baker St. Railway*, 49 Mich. 153; *Henry v. Lake Shore & Michigan Southern Ry.*, 49 Mich. 495. These cases refer to a line of earlier cases in our own court and elsewhere.

It is also well settled that negligence cannot be presumed where nothing is done out of the usual course of business, unless that course itself is improper. There must be some special circumstances, calling for more particular care or caution, in order to make a liability. *Stephenson v. G. T. R. Co.*, 34 Mich. 323; *G. R. & Indiana R. R. v. Judson*, 34 Mich. 506; *Flint & P. M. Ry. v. Stark*, 38 Mich. 714; *Downey v. Hendrie*, 46 Mich. 498, s. c. 8 Am. & Eng. R. R. Cas. 386; *Mich. Cent. R. R. v. Coleman*, 28 Mich. 440; *Haas v. G. R. & Ind. R. R.*, 47 Mich. 401, s. c. 8 Am. & Eng. R. R. Cas. 268; *Chicago & N. W. Ry. Co. v. Smith*, 46 Mich. 504, s. c. 4 Am. & Eng. R. R. Cas. 435; *Brown v. Congress & Baker St. Ry.*, 49 Mich. 153, s. c. 8 Am. & Eng. R. R. Cas. 383; *Henry v. Lake Shore & M. S. Ry.*, 49 Mich. 495, s. c. 8 Am. & Eng. R. R. Cas. 310.

The only cause of the mischief, leaving defendant's carelessness or negligence out of view, was her mistaken supposition that the cars had stopped for the station, and that she should therefore get out. There was nothing at the spot to indicate a landing place, and there was, at the proper place, a short distance further on, a building and platform appropriate and used for that purpose. The stoppage of the cars was required by statute, as well as by usage, as a precaution against collisions. The calling of the station was not shown to have been out of the usual course, and from the distance mentioned we can hardly conceive it should have been delayed. No one representing the company, whether conductor or brakeman, is shown to have known or suspected that plaintiff had put herself in peril or left her place. Nothing is shown which put them in fault for not knowing this.

We cannot discover anything in the record to indicate that there was any act or any omission not incident to the constant usage of the road, or indicating fault. The starting of the train after such

a stoppage is an incident plainly contemplated by law. The company, as held in some of the cases above cited, cannot be expected to treat its passengers as children, or to put them under restraint. Passengers must take the responsibility of informing themselves concerning the every-day incidents of railway traveling, and the company could not do business on any other basis. This case does not differ in principle from those in 28 and 38 Michigan, and it resembles some of the others very closely. The law does not affix any responsibility for injuries purely accidental, and that is in our judgment the utmost that can be asserted on the facts presented, if plaintiff was not herself negligent.

The judgment should be reversed with costs, and a new trial granted.

The other justices concurred.

Passengers Hearing Name of Station Called Justified in Attempting to Alight.—Where a Passenger upon a railroad train hears the name of the station called which is his destination, and the train soon or immediately thereafter stops in the dark, the passenger may safely conclude that the train has stopped at the station, and if under this belief he endeavors to alight and is injured owing to the train having stopped short of or beyond the station, the company will be held liable. *Central R. Co. v. Van Horn*, 38 N. J. L. 183; *Columbus, etc., R. R. Co. v. Farrell*, 81 Ind. 408; *Taber v. Delaware, etc., R. Co.*, 71 N. Y. 489; *Penna. Co. v. Hoagland*, 3 Am. & Eng. R. R. Cas. 436; *Wood v. Lake Shore & M. S. R. Co.*, 49 Mich. 370; s. c. 8 Am. & Eng. R. R. Cas. 478; *Terre Haute & Ind. R. R. Co. v. Buck*, *infra*. But see *Pabst v. Baltimore, etc., R. Co.*, 2 McA. 42.

The English cases are to the effect that the question of negligence in such case is for the jury. *Whittaker v. Manchester, etc., R. Co.*, L. R. 5 C. P. 464; *Petty v. Great Western R. Co.*, L. R. 5 C. P. 461; *Wellor v. London, etc., R. Co.*, L. R. 9 C. P. 126; *Bridges v. North London R. Co.*, L. R. 7 H. L. 213.

Other Indications Justifying Passenger in Supposing Station has been Reached.—Other indications that the train has reached the station may be sufficient in warranting the passenger to alight besides the prior calling of the name of the station. In such cases also the company will be held liable for an injury occasioned by a failure to stop at the station. *Robson v. N. E. R. Co.*, 10 L. R. 271; *Jeffersonville, etc., R. R. Co. v. Hendricks*, 41 Ind. 48; *Cockle v. London, etc., R. Co.*, L. R. 7 C. P. 321.

Contributory Negligence.—In some cases the passenger is so clearly guilty of contributory negligence as to preclude the right of recovery. *Frost v. Grand Trunk, etc., R. Co.*, 10 Allen, 887; *Harrold v. Great Western R. Co.*, 14 L. T. (N. S.) 440; *Lewis v. London, etc., R. Co.*, L. R. 9 Q. B. 66; *Cincinnati, W. & M. R. R. Co. v. Peters*, 6 Am. & Eng. R. R. Cas. 126.

LINDSEY

v.

CHICAGO, R. I. & P. R. Co.

(*Advance Case, Iowa, October 7, 1884.*)

A passenger on a train that reached his destination about midnight failed to get off because he was asleep, and after the train had started a brakeman

asked him if he did not intend to get off at that station, and that if he did he "had better be getting off quick," upon which he went out on the platform of the car and stepped down on the second or third step, to look out for the depot, as he claimed, when the train gave a sudden jerk and he was thrown to the ground and injured. *Held*, that he was guilty of contributory negligence, and not entitled to recover damages.

APPEAL from Appanoose Circuit Court.

The plaintiff was a passenger on a freight train operated by the defendant, and claims to have been injured because of the negligence of the employes of defendant in the operation of the train. Trial by jury, judgment for the plaintiff, and the defendant appeals.

M. A. Low, for appellant.

G. Taylor Wright, Tannehill & Fee, and *Freeland & Miles*, for appellee.

SEEVERS, J.—The plaintiff entered the train at Princeton, and his destination was Lineville. The train reached the last-named place about midnight of a dark night, and the caboose in which the plaintiff was seated was stopped seventy-five or 100 yards from the depot. Several other passengers got off the train, but the plaintiff failed to do so, because he was sleeping and did not know when the train stopped. After the train had started to leave Lineville, as the plaintiff testified, a brakeman "spoke to me and inquired if I didn't wish to get off at Lineville? I said I did. The answer was, 'then, if you are, you had better be getting off, and that quick.'" Thereupon the plaintiff, with his overcoat over his arm, a "valise" in his hand, started for the rear of the car. The jury found the train was then moving at the speed of seven miles an hour, and that it was unsafe to leave the train, and that a reasonably prudent person, acting under like circumstances, would not have attempted to leave the train. The speed of the train was not checked, and the plaintiff passed out of the car to the platform, and stepped down on the second or third step for the purpose of looking for the depot, as he testified. How long he remained in that position is uncertain, but only a short time intervened before the plaintiff turned partly or wholly around for the purpose of regaining the platform, when there was a sudden jerk of the train, which threw him from the platform to the ground, and thereby his injuries were received. The jury found that the position of the plaintiff on the steps was dangerous, and that his purpose in placing himself there was to leave the train if it stopped. The jury found the engineer was not negligent, and that the slack in the train was taken up in the ordinary manner. There was no evidence tending to show that the jerk was caused by the negligence of any employé of the defendant.

The failure to stop the caboose at the depot did not contribute

to the accident, because the plaintiff was then sleeping and made no attempt to leave the train at that time. The only evidence tending to show the station was not called or announced prior to the stopping of the train, is that of the plaintiff and one other person, who testify they did not hear such announcement; but they both testify they were sleeping when the train stopped. Of course, such evidence has no tendency to establish such fact. The only remaining ground of negligence is that the brakeman, as counsel for the appellee claim, directed the plaintiff "to get off quickly." What the brakeman said hardly amounts to a direction. But it may be said he advised the plaintiff to get off quickly, and conceding the plaintiff was authorized to act on what the brakeman said, and that he cannot be regarded as being guilty of contributory negligence while making preparations to leave the car, still we think that thereafter he was clearly guilty of such negligence. When he got to the door of the car and stepped on the platform the train was going too fast to enable him to leave the train with safety; but not only did he do this, but stepped down on the second or third step, and thus placed himself in a dangerous position, and while in such position the jerk came and thereby he was thrown to the ground.

The accident was caused by the plaintiff's going on the platform and steps. This, undoubtedly, was the proximate cause of his injury. Was he justified in placing himself in that position? We think not. Conceding the brakeman did direct the plaintiff, when in his seat in the car, to get off quickly, this would not justify the plaintiff in making the attempt after he got to the door of the car and saw that he could not do so with safety. Unless the plaintiff intended to leave the car if he could do so, he had no right to pass out of it and down to the steps. In order to leave the car he placed himself in a dangerous position, as the jury have found. When he placed himself in such position he was guilty of contributory negligence. It seems to us that when the jury found that the plaintiff was in a dangerous position when on the steps, that it must logically follow that he cannot recover, and the jury should have so found. This is a stronger case against the plaintiff, in our judgment, than *Bon v. Railway Pass. Assur. Co.*, 56 Iowa, 669. There are cases where a passenger is justified in taking risks—where, by the negligence of the company, he is in danger of being carried beyond his destination—and we are not prepared to say a passenger would not be justified in making the attempt to step from the train if it was moving slowly: that is, it would be a question for the jury. But in this case the jury have found that the plaintiff voluntarily placed himself in a dangerous position, and this, it seems to us, ends the inquiry.

In our opinion the plaintiff is not entitled to recover.

Reversed.

Passengers Alighting From Moving Train.—The act of a passenger in jumping from a moving train amounts to such contributory negligence on his part as will bar recovery for an injury occasioned to him. *Lucas v. New Bedford, etc., R. Co.*, 6 Gray, 64; *Gavett v. Manchester, etc., R. Co.*, 16 Gray, 501; *Jeffersonville, etc., R. Co. v. Hendricks, Adm'r*, 26 Ind. 288; *Dumont v. New Orleans, etc., R. Co.*, 9 La. Ann. 441; *Railroad Co. v. Aspell*, 28 Pa. St. 147; *Dougherty v. Chicago, etc., R. Co.*, 86 Ill. 467; *Morrison v. Erie R. Co.*, 56 N. Y. 803; *Burrows v. Erie R. Co.*, 68 N. Y. 556; *Atchison, T. & S. F. R. Co. v. Flynn*, 1 Am. & Eng. R. R. Cas. 240; *Price v. St. Louis, K. C. & N. R. R. Co.*, 8 Am. & Eng. R. R. Cas. 865; *Treat v. Boston & L. R. R. Co.*, 8 Am. & Eng. R. R. Cas. 428; *Lake Shore & M. S. R. Co. v. Bangs*, 8 Am. & Eng. R. R. Cas. 426; *Jewell v. Chicago, etc., R. Co.*, 6 Am. & Eng. R. R. Cas. 879; *Wabash, etc., R. Co. v. Rector*, 9 Am. & Eng. R. R. Cas. 264; *Houston, etc., R. Co. v. Leslie*, 9 Am. & Eng. R. R. Cas. 407; *Central R. R. & B. Co. v. Letcher*, 12 Am. & Eng. R. R. Cas. 115.

But see *Chicago, etc., R. Co. v. Bonifield*, 8 Am. & Eng. R. R. Cas. 493; *Swigert v. Hannibal, etc., R. R. Co.*, 9 Am. & Eng. R. R. Cas. 322; *Brooks v. Boston & Maine R. R. Co.*, 16 Am. & Eng. R. R. Cas. 345; *Edgar et ux v. Northern Ry. Co.*, 16 Am. & Eng. R. R. Cas. 347.

How far Orders of Servants Warrant Passengers in Assuming Dangerous Position or Doing Dangerous Act.—As to when passengers will be justified and when they will not, by reason of the directions of the conductor, in assuming a dangerous position or doing a dangerous act, see *McIntyre v. New York, etc., R. Co.*, 87 N. Y. 287; *Cleveland, etc., R. Co. v. Manson*, 80 Ohio St. 454; *Taber v. Delaware, etc., R. Co.*, 71 N. Y. 489; *Central R. Co. v. Van Horn*, 88 N. J. L. 188; *Columbus, etc., R. R. Co. v. Farrell*, 81 Ind. 488; *Delamatyr v. Milwaukee, etc., R. R. Co.*, 24 Wisc. 578; *Evansville, etc., R. R. Co. v. Duncan*, 28 Ind. 441; *Pabst v. Baltimore, etc., R. Co.*, 2 McA. 42; *Georgia, etc., R. R. Co. v. McCurdy*, 45 Ga. 288; *Lambeth v. N. C. R. R. Co.*, 66 N. Y. 494; *Filer v. New York, etc., R. R. Co.*, 68 N. Y. 124; *Wyatt v. Citizens R. Co.*, 55 Mo. 485; *Lovett v. Salem R. Co.*, 9 Allen. 551; *Hazard v. Chicago, etc., R. Co.*, 1 Biss. 503; *Chicago, etc., R. Co. v. Randolph*, 58 Ill. 510; *Columbus, etc., R. R. Co. v. Powell*, 40 Ind. 87; *Penna. Co. v. Hoagland*, 8 Am. & Eng. R. R. Cas. 486; *Little Rock & Ft. Smith R. R. Co. v. Miles*, 18 Am. & Eng. R. R. Cas. 10.

CUMBERLAND VALLEY RAILROAD COMPANY

v.

MAUGANS.

(61 *Maryland Reports*, 53.)

A young man in vigorous health, strong, active, and in the full possession of all his physical and mental faculties, having a valise containing clothing in his right hand, and a basket of provisions on his left arm, attempted in broad daylight to leave a railway train while it was moving slowly, the distance from the lower step of the car to the platform being only eighteen inches, and in doing so was seriously injured. In an action of damages against the railroad company it was *held*, that under the circumstances, in voluntarily stepping from the car when it was in motion, and when he had not the free and unrestricted use of his hands and arms, the plaintiff was not guilty of such negligence as would justify the court in taking the case from the consideration of the jury.

APPEAL from the Circuit Court for Washington county.

This was an action brought by the appellee to recover damages

from the appellant for injuries he sustained through its negligence, while stepping from one of its cars at Green Castle, a station on its road. The plaintiff testified that he got upon a train of the defendant at Maugansville, where he resided, and paid his passage to Green Castle, a regular station on the defendant's road, in company with his mother, an unmarried sister, a married sister, with her husband and two children, aged four and six years; the two children and a valise containing the clothing of his married sister and two children, weighing from fifteen to twenty pounds, and a basket containing provisions for his sister and children, weighing from eight to twelve pounds, were under his charge, his sister's husband having gone, before the train stopped, to the front car to look after his baggage, which the defendant refused to check, never having checked baggage from the Maugansville station; that, as the train approached Green Castle, he carried said valise and basket to a short seat near the door of the car, preparatory to leaving, and took his position at the door with the children, with his hand upon the knob, and at the instant the train stopped he opened the door and stepped one foot out on the platform and passed the children out on the platform of the car, where some one took them and helped them down; that he immediately turned around for the valise and basket; as he did so his mother and sisters immediately followed the children out; that he picked up the valise and basket without delay and started to go out of the car, when he met at the door passengers coming in, which delayed him an instant, and as soon as possible he got upon the platform of the car in which he had been riding with the intention of leaving the car, and in the act of leaving the car, with the basket on his left arm and the valise in his right hand, he then noticed that the train was beginning to move, and the steps of the platform of that car being full of persons he stepped as rapidly as he could to the platform of the car in front, and from there down the steps on to the station platform, which was level with the track, while the train was in slow motion, it having moved ten or twelve or probably fourteen feet from where it had been standing; in stepping from the last step of said car to the station platform, with the basket on his left arm and valise in his right hand, while the train was in motion as aforesaid, he fell and was injured; that, as he stepped from the platform of the car in which he had been riding to the platform of the front car, he saw the brakeman and the assistant ticket agent standing on the steps of that car; he said, "Gentlemen, make room, I want to get off;" as he passed down the steps of that car he passed the brakeman, who was standing on the second step, and who said to him, "Why did you not get off sooner?" to which he replied, "Because I could not;" on the third or last step stood the assistant ticket agent, and as he, plaintiff, passed him and was about stepping from the last

step, he, the said ticket agent, placed his hand on plaintiff's shoulder and said, "Be careful; you might fall;" plaintiff supposed he put his hand on him to assist him down; that he was prevented from taking hold of the railing of the car, because the brakeman and the assistant ticket agent were standing on the steps with their backs against the car; that the left hand of the arm on which he had the basket was free, with which he could have taken hold of the rail on that side if they had not been there, and he could have put the valise in the other hand, and would have had his right hand free if these men had not been on the steps. In forming the intention to get off the cars, and in the act of getting off, he used all the care and prudence he could, and he used all the haste and diligence he could in getting off; that he did not give any notice to any of the defendant's agents or employes (except as before stated) that he intended to get off the cars, and did not request them to stop the train after he found it was in motion; that he passed off the train as rapidly as he could—no one could have gotten off quicker; that his intention was to get off the train after he found it was in motion, and the action of the assistant ticket agent did not influence him in getting off the train; that the accident would not have occurred if he had not stepped off the train; and that it is more hazardous to attempt to get off a train with basket and valise than without them. And further, that neither the conductor nor brakeman were at the steps of the car, on the arrival of the train at Green Castle, to assist the passengers with their children and baggage from the cars; that passengers getting on were rushing in the cars before those destined for Green Castle had time to get off, and that plaintiff's mother and sisters were crowded in getting down; that the brakeman who was standing on the step when plaintiff was getting off did not offer to stop the train and let him off, nor did he tell plaintiff it was dangerous to attempt to leave the car at the time he was in the act of getting off, nor did the brakeman in any way assist or offer to assist him in getting off, by relieving him of his baggage, or advising him as to how he should get off; that he did not know there was any danger in getting off the train whilst it was moving slowly, and that if he had known there was he would not have gotten off.

The defendant offered evidence tending to prove that the assistant ticket agent was standing on the third or last step of the car, and that he did not notice the plaintiff until he was in the act of getting off the last car-step on to the station platform, which was eighteen inches down from the last step; that the train had moved at least fifty feet from where it had first stopped; that there were eleven passengers let off the train at that station, and thirteen passengers got on the train before the cars started, and the train reached Green Castle on time.

Prayers were offered on both sides, but their insertion is

deemed unnecessary. One of the prayers of the defendant, which the court (Alvey, J.) rejected, was as follows:

“9. That, upon the undisputed facts in this case, the plaintiff has shown no ground of action, and therefore the verdict must be for the defendant.”

The defendant excepted to the rulings of the court and appealed, the verdict and judgment being for the plaintiff.

John Stewart and George W. Smith, Jr., for the appellant.

J. Clarence Lane and H. H. Keedy, for the appellee.

MILLER, J.—The plaintiff in this case was a passenger to Green Castle, an intermediate station on the defendant's road, and fell and was injured in leaving the cars at that station. He alleges, and, for the purpose of determining the single question presented by this appeal, we shall assume it to be true, that those in charge of the train were negligent in starting it before time had been allowed for passengers to leave in safety. There can be no question as to the duty of the defendant in this respect. A railroad company undertaking the carriage of passengers to an intermediate point on its road is bound to stop its trains there a sufficient length of time to enable all passengers whose destination is that point to alight in safety.

But the undisputed facts are, that the train was in motion, and the plaintiff knew it was moving when he stepped from it, and that he had at the time a valise containing clothing which weighed from fifteen to twenty pounds in his right hand, and a basket containing provisions which weighed from eight to twelve pounds on his left arm. It is not shown that he was directed or requested or encouraged thus to step from the car by any agent or employé of the company, or that he would have been in any peril if he had remained on the train, or that he was under any undue excitement or alarm. At the trial it was contended that by thus voluntarily stepping from the car when he knew it was in motion, and when he had not the free and unrestricted use of his hands and arms, because of the luggage he was carrying, he was guilty of such negligence as would prevent a recovery, and that the court should so declare, and direct a verdict for the defendant. The refusal of the court below thus to take the case from the jury presents the only question that has been argued in this court.

Counsel for the appellant have presented their side of the question with much ability and force of argument, but we cannot adopt their views of the case. We agree that, while the question of negligence is ordinarily one of fact and not of law, cases do occur (and perhaps the number of such cases is increasing) in which it becomes the duty of the court to interpose and withdraw them from the consideration of the jury. The case, however, must

be a very clear one to justify a court in taking upon itself this responsibility; it must present some prominent and decisive act in regard to the effect and character of which no room is left for ordinary minds to differ. *Fitzpatrick's Case*, 35 Md. 46; *Stansbury's Case*, 54 Md. 655. Accidents occur and injuries are inflicted under an almost infinite variety of circumstances, and it is quite impossible for the courts to fix the standard of duty and conduct by a general and inflexible rule applicable to all cases, so that a departure from it can be pronounced negligence in law. The rule that requires a party before he crosses a railroad track to stop, look and listen for approaching trains, which has been generally adopted by the courts, is the only one that approaches universality of application in reference to a particular class of accidents. But there is no such general accord of judicial opinion and precedent in reference to attempts to leave a car while it is in motion. The cases cited in the briefs of counsel on both sides show very clearly that the weight of authority is against the proposition that it is *always*, as matter of law, negligence and want of ordinary care for a person to attempt to get off from a car when it is in motion. This proposition was pressed upon the Court of Appeals of New York in the case of *Morrison v. Erie Railway Co.*, 56 N. Y. 302; but *Folger, J.*, in delivering the opinion of the court in that case, said: "Were I disposed to accede to it upon principle, which I am not, I should feel myself precluded by prior decisions of this court, and influenced to a contrary conclusion by those of other courts. The rule established, and as I think the true one, is, that all the circumstances of each case must be considered in determining whether in that case there was contributory negligence or want of ordinary care, and that it is not sound to select one prominent and important fact which may occur in many cases, and to say, that being present, there must, as matter of law, have been contributory negligence. The circumstances vary infinitely, and always affect and more or less control each other. Each must be duly weighed and relatively considered before the weight to be given to it is known."

In the present case counsel for the company rely solely upon the prominent fact that the plaintiff attempted to leave the train while it was in motion, and when he was so cumbered with luggage as not to be able to use the railing on either side of the car-steps as a protection or aid in stepping to the platform, and they insist that such an act would be universally condemned by persons of ordinary intelligence and common prudence as culpable negligence or reckless carelessness. But there are other facts and circumstances which must be considered. The plaintiff testified (and for the purpose of the question we are considering we must assume his testimony to be true) that at the time he made the step

or jump the train was in slow motion, not having moved more than fourteen feet from where it had been standing. The distance from the lower step of the car to the platform was but eighteen inches, and it was broad daylight at the time. He was twenty-nine years of age on the day the accident happened, active, strong and in vigorous health, and a blacksmith by occupation. In our judgment these circumstances have a very important bearing upon the question before us; for, while it may be true that every one would pronounce it an act of reckless imprudence for a person to jump from a train of cars when in rapid motion, or at night and in the dark, when dangers or obstructions that could not be seen were in the way, or for a person of impaired health and in a weak physical condition, or of an advanced age, to make the attempt when the train was in slow motion, we do not think the same unanimity of opinion would exist in reference to an attempt to step down eighteen inches to a platform from a train moving very slowly, made in broad daylight by a young man in vigorous health, strong, active, and in the full possession of all his physical and mental faculties, even though he might have had a valise in one hand and a basket in the other. It is matter of common observation and experience that those who are young, healthy and vigorous frequently do acts and assume risks which it would be culpable negligence in others of feeble health or advanced age to attempt. At all events we are clearly of opinion that whether there was negligence or want of ordinary care in the conduct and acts of the plaintiff, under all the circumstances of this case, is a question in regard to which reasonable men may honestly entertain different views. This being so, it follows that we must sustain the refusal of the court below to withdraw the case from the consideration of the jury; for, as has been well said by Cooley, C. J., in *Van Stimburg's Case*, 17 Mich. 99, "When the question arises upon a state of facts on which reasonable men may fairly arrive at different conclusions, the fact of negligence cannot be determined until one or the other of these conclusions has been drawn by the jury. The inferences to be drawn from the evidence must either be certain and incontrovertible, or they cannot be decided upon by the court. Negligence cannot be conclusively established by a state of facts upon which fair-minded men may well differ."

This disposes of the only controversy in the case, as no objection has been urged to the rulings of the court, made upon the assumption that the question of negligence was to be left to the jury, and it follows that the judgment must be affirmed.

Judgment affirmed.

When Act of Passenger in Alighting from Moving Train is not Contributory Negligence *per se*.—It is not always contributory negligence

per se for a passenger to endeavor to get on or off a moving train. When the train is moving very slowly, the distance to the ground very small, and the party in question vigorous and active, the question of contributory negligence is for the jury. *Illinois, etc., R. Co. v. Able*, 59 Ill. 131; *Kentucky, etc., R. Co. v. Dills*, 4 Bush. 593; *Doss v. Missouri, etc., R. Co.*, 59 Mo. 27; *Chicago & Alton R. Co. v. Bonifield*, 8 Am. & Eng. R. R. Cas. 493.

When Train has not Stopped Sufficient Time to Allow Passenger to Alight, Act of Stepping off Moving Train is not Contributory Negligence *per se*.—Where the train has not stopped a sufficient length of time to permit a passenger to alight, the question of his contributory negligence in attempting to get off after the train has started is for the jury. *Pennsylvania R. R. Co. v. Kilgore*, 32 Pa. St. 292; *Loyd v. Hannibal & St. Joe R. Co.*, 53 Mo. 509; *Morrison v. Erie R. Co.*, 56 N. Y. 302; *Swigert v. Hannibal & St. Joe R. R. Co.*, 9 Am. & Eng. R. R. Cas. 822; *Edgar and Wife v. Northern R. Co.*, 16 Am. & Eng. R. R. Cas. 347; *Brooks v. Boston & Me. R. R. Co.*, 16 Am. & Eng. R. R. Cas. 345; *Treat v. Boston & Lowell R. Co.*, 3 Am. & Eng. R. R. Cas. 423; *Knowlton v. Milwaukee City R. Co.*, 16 Am. & Eng. R. R. Cas. 330.

But see, *contra*, *Jewell v. Chicago, etc., R. Co.*, 6 Am. & Eng. R. R. Cas. 379.

Stepping off Platform of Street Car in Motion is not Contributory Negligence *per se*.—In the case of street cars, the conduct of a passenger in jumping from the car while moving does not amount to contributory negligence *per se*. The question is always for the jury. *Philadelphia City Pass. Ry. Co. v. Hassard*, 75 Pa. St. 367; *Wyatt v. Citizens' Ry. Co.*, 55 Mo. 485; *Crissey v. Hestonville, etc., R. R. Co.*, 75 Pa. St. 83; *Rathbone v. Union R. Co.*, 13 Am. & Eng. R. R. Cas. 58.

But see, *contra*, *Nichols v. Sixth Ave. R. R. Co.*, 38 N. Y. 131.

PENNSYLVANIA COMPANY

v.

DEAN.

(92 *Indiana Reports*, 459.)

A complaint against a railroad company for a personal injury alleged that the plaintiff, without his fault or negligence, was injured thus: "Being on one of said defendant's trains, the servants of the defendant, while said train was in motion, ordered and compelled him to jump from said train, the coaches of which passed over his lower limbs," whereby, etc.; "that said injuries were committed and perpetrated upon him by the carelessness and negligence of the defendant's servants," etc. *Held*, that the refusal of a motion to make more specific, by showing by what right the plaintiff was on the train, and also more particularly the negligence of the defendant's servants, was error.

FROM the Clark Circuit Court.

S. Stansifer and *W. D. Stansifer*, for appellant.

J. G. Howard, — *Whitaker* and — *Parsons*, for appellee.

HAMMOND, J.—The appellee, being a minor, brought this action by his *prochein ami* against the appellant and the Jeffersonville, Madison & Indianapolis Railroad Company, to recover damages

for an injury received upon defendants' railroad. The defendants severed in their defences. The case was tried by a jury, resulting in a verdict and judgment in favor of the Jeffersonville, Madison & Indianapolis Railroad Company, but against the appellant.

The appellant at the proper time moved that the appellee's complaint be made more specific. This motion was overruled. It then demurred unsuccessfully to the complaint. Its motion for a new trial was also overruled. To these rulings proper exceptions were taken, and the assignment of errors calls their correctness in question in this court.

The complaint was as follows :

"The complainant, Frank B. Dean, who is an infant and sues by his next friend, John Rauschenberger, complains of the defendants, the Pennsylvania Company and the Jeffersonville, Madison & Indianapolis Railroad, and says that on the 14th day of February, 1880, in the city of Jeffersonville, Indiana, the grievances hereinafter set out were done and committed to and upon him by the servants, agents and employés of the defendants, and that at the time the injuries were inflicted upon him he was without fault or negligence contributing to the same. He says that the defendants are corporations, created by law, and having authority to carry on their business, viz., that of a steam railway in the State of Indiana, having all the privileges usually conferred by law upon such corporations. He says that under defendant Pennsylvania Company's control and lesseeship is a local railway, operated and run by steam locomotives, connecting the cities of Louisville, Jeffersonville and New Albany, by way of the Ohio river bridge ; and that said local railway runs through a portion of the city of Jeffersonville, Indiana, a portion of which lies between Wall and Spring streets ; that while passing over said road, and while between said streets in said city, the infant plaintiff Frank B. Dean being on one of said defendants' trains, the agents, servants and employés of said defendants, while said train was in motion, ordered and compelled said infant plaintiff to jump from said train of cars, the coach or coaches of which passed over his lower limbs, breaking his leg, maiming and horribly crushing his feet, and otherwise painfully bruising his body, from which injuries said plaintiff has been rendered an invalid for life. Plaintiff alleges and charges that said injuries were committed and perpetrated upon him by the carelessness and negligence of the agents, servants and employés of said defendants, to his great damage in the sum of \$20,000 ; and that said infant plaintiff, he avers, was without fault or negligence which contributed to the same. Wherefore," etc.

The defendants, in their motion to have the complaint made more specific, asked that the appellee be required to show by proper averment of facts by what right he was upon the train at

the time of receiving the injury; and also that he be required to make the averments of negligence upon the part of the defendants' agents and servants more specific.

The averment of the complaint simply shows that the appellee was on the appellant's train when he was ordered and commanded to jump off. Whether he was there as a passenger, an employé or a trespasser, does not appear. We think the appellant was entitled to have the appellee allege in his complaint in what capacity he was upon the train. The rights and liabilities of the appellant could not intelligently be adjudicated without the knowledge and consideration of the fact thus sought to be developed. If the appellee was upon the train as a passenger, having paid, tendered or been in readiness to pay his fare, then the appellant was charged with a very high duty and responsibility to carry him safely and to protect him from the wrongful and negligent acts of all its employés, whereby his security might have been endangered; and in such case, if from a failure to discharge this duty the appellee received an injury, the appellant would be liable for damages therefor. *Chicago, etc., R. R. Co. v. Flexman*, 103 Ill. 546, s. c. 8 Am. & Eng. R. R. Cas. 354; *Gillenwater v. Madison, etc., R. R. Co.*, 5 Ind. 339; *Jeffersonville R. R. Co. v. Hendricks*, 26 Ind. 228; *Evansville, etc., R. R. Co. v. Duncan*, 28 Ind. 441; *Jeffersonville, etc., R. R. Co. v. Riley*, 39 Ind. 568; *Columbus, etc., R. W. Co. v. Powell*, 40 Ind. 37; *Ohio, etc., R. W. Co. v. Selby*, 47 Ind. 471; *Jeffersonville, etc., R. R. Co. v. Parmelee*, 51 Ind. 42; *Cleveland, etc., R. R. Co. v. Newell*, 75 Ind. 542, s. c. 8 Am. & Eng. R. R. Cas. 377; *Terre Haute, etc., R. R. Co. v. Jackson*, 81 Ind. 19, s. c. 6 Am. & Eng. R. R. Cas. 178.

If, however, the appellee was on the train as an employé, the appellant would not be liable for an injury resulting from an act of a co-employé unless it was shown that such co-employé was incompetent or unfit for the employment in which he was engaged, and that the appellant was guilty of negligence in engaging or retaining him in its service. *Columbus, etc., R. W. Co. v. Arnold*, 31 Ind. 174; *Pittsburgh, etc., R. W. Co. v. Ruby*, 38 Ind. 294; *Hildebrand v. Toledo, etc., R. W. Co.*, 47 Ind. 399; *Gormley v. Ohio, etc., R. W. Co.*, 72 Ind. 31, s. c. 5 Am. & Eng. R. R. Cas. 581; *Ohio, etc., R. W. Co. v. Collarn*, 73 Ind. 261, s. c. 5 Am. & Eng. R. R. Cas. 584.

But if the appellee was on the train without right, being a mere trespasser, the fact that the injury was occasioned by the negligence or unlawful acts of the appellant's employés would not make the appellant liable unless it further appeared that the acts complained of occurred within the scope of the servants' employment. *Everhart v. Terre Haute, etc., R. R. Co.*, 78 Ind. 292; *Flower v. Pennsylvania R. R. Co.*, 69 Pa. St. 210; *Towanda Coal Co. v. Heeman*, 86 Pa. St. 418; *Golden v. Newbrand*, 52 Iowa, 59;

Marion v. Chicago, etc., R. R. Co., 59 Iowa, 428; **New Orleans, etc., R. R. Co. v. Harrison**, 48 Miss. 112; **Wright v. Wilcox**, 19 Wend. 343; **Mali v. Lord**, 39 N. Y. 381; **Fraser v. Freeman**, 43 N. Y. 566 (3 Am. R. 740); **Little Miami R. R. Co. v. Wetmore**, 19 Ohio St. 110.

The above legal propositions, abundantly sustained by the authorities cited, show that the capacity in which the appellee was upon the train at the time of the wrong complained of was an indispensable fact to consider in determining the appellant's liability.

We think, also, that the appellee should have been required to make his complaint more specific respecting the negligence of the appellant's employes. He alleges in his complaint that the train was in motion, but whether moving rapidly or slowly is not stated. The averment might be true, and yet the train moving at such a moderate rate of speed as not to make the alighting from it necessarily, or even probably, dangerous.

The appellant, without giving his age, states that he was an infant. This would have been true if he was ever so near, but not quite, twenty-one years of age. The simple averment of infancy conveys no adequate idea of his ability or inability to take care of himself. It is alleged that the appellant's agents, servants and employes ordered and compelled the appellee to jump from the train. These are conclusions. What was done in ordering and compelling him to jump from the train should have been stated. Facts not conclusions should have been averred, showing how and the circumstances under which the appellee was ejected from the train, together with such other matters pertaining to the injury as would enable the court, in ruling on the demurrer to the complaint, to determine whether the appellant, on the facts stated, was liable. It is too plain, we think, for controversy, that the appellant's motion to require the appellee to make his complaint more specific should have been sustained. The overruling of that motion was an error for which the judgment below will have to be reversed. **Sec. 376, R. S. 1881; Cincinnati, etc., R. R. Co. v. Chester**, 57 Ind. 297; **Volger v. Sidener**, 86 Ind. 545; 1 **Works Pr.**, Sec. 493.

The conclusion reached makes it unnecessary to consider other alleged errors.

Judgment reversed, at appellee's costs, with instructions to the court below to sustain the motion to make the complaint more specific as to the points referred to in this opinion, and for further proceedings.

INDIANA, BLOOMINGTON & WESTERN RAILWAY CO.

v.

BURDGE.

(94 Indiana Reports, 46.)

A alleged in his complaint that he was riding on the platform of one of the cars of the company defendant in accordance with a custom on the part of the company to permit passengers to stand there, and was thrown to the ground by the wilful and reckless act of the engineer in starting the train with a jerk. *Held*, that the company was liable for such an act on the part of its servant, and further, that the act being alleged to be wilful, no allegation of freedom from contributory negligence was necessary. *Held*, therefore, that a demurrer to the complaint was properly overruled.

The evidence in the case being insufficient to show that the injury was wilful, *held*, that the plaintiff was not entitled to judgment.

FROM the Superior Court of Marion county.

C. W. Fairbanks, A. C. Harris and W. H. Calkins, for appellant.

E. A. Parker, for appellee.

BICKNELL, C. C.—The complaint of the appellee alleged that the plaintiff, who was a day laborer, took passage on one of the defendant's trains at the Western Elevator, west of White river, in Marion county, intending to ride thereon to the Union depot, in Indianapolis; that he paid his fare; that it was the custom of such passengers on said train, with the knowledge and consent of those in charge of the train, to ride upon the platforms outside of the car, and pay their fares there; that plaintiff, in accordance with such custom, and with such knowledge and consent, was standing on such a platform; that in the corporate limits of the city of Indianapolis, and while the speed of the train was more than ten miles an hour, the train was almost entirely stopped to give time for the adjustment of a switch, and that immediately after such adjustment the defendant's engineer on said train, in a wilful, reckless, careless and unlawful manner, let on such a volume of steam to the engine as caused said train to jump and jerk into immediate movement at a very high and unlawful rate of speed in said city, whereby the plaintiff, without his fault, was thrown violently to the ground and his collar bone was broken, and other personal injuries were by him sustained, to his damage \$5,000.

A demurrer to this complaint, for want of facts sufficient, was overruled. The defendant answered by a general denial. A jury at the special term returned a verdict for the plaintiff for \$250.

The defendant's motion for a new trial was overruled; judgment was rendered on the verdict. The defendant appealed to the superior court in general term, assigning for error there the overruling of the demurrer to the complaint and the overruling of the motion for a new trial. The court, in general term, affirmed the judgment of the court in special term. The defendant appeals to this court, and assigns for error here the affirmance by the superior court in general term of the judgment at the special term. As the complaint charges a wilful injury, it presents no question as to contributory negligence. *Terre Haute, etc., R. R. Co. v. Graham*, 46 Ind. 239; *Jeffersonville, etc., R. R. Co. v. Goldsmith*, 47 Ind. 43; *Evansville, etc., R. R. Co. v. Lowdermilk*, 15 Ind. 120. A railroad company may be liable for the wilful acts of its employés within the scope of their employment. *Jeffersonville R. R. Co. v. Rogers*, 38 Ind. 116; *Indianapolis, etc., R. R. Co. v. McClaren*, 62 Ind. 556. There was no error in overruling the demurrer to the complaint.

The principal question arising on the motion for a new trial is, was the verdict sustained by sufficient evidence? A verdict cannot be disturbed where there is any competent evidence tending to support it. Under the allegations of the complaint here, there could be no recovery unless the injury were proved to have been wilful. We think there was no evidence tending to show a wilful injury.

The plaintiff testified: "After they run through into the east end of the bridge they slacked up to throw the switch; they did not stop right still; they stopped very near still; and as quick as the switch was turned they made a surge and went off with a quick start. I had my right hand hold of the rail as they made the surge, and it threw me off on this side of the switch. * * * It stopped just all at once; you may say it started the same way; * * * it jerked every one on the train; * * * it gave the train a jerk and throwed me off. I could not hold; it jerked so quick that it broke my hold and throwed me off on the side of the track. I was there a minute or two until I got up; it broke my collar bone and I was hurt all through. There were three persons on the platform; nobody was thrown off but me; the train was then running at the rate of ten miles an hour." Upon cross-examination, the following question was put to the plaintiff: "If I understand you, what you mean to say is, that the train came across the bridge at the rate of eight or ten miles an hour, and without slacking much, and then they put on steam and jumped off so rapidly as to loosen your hold of your hand on the platform rail and throw you headlong into the ditch?" Answer. "Yes, sir." The foregoing was the testimony on behalf of the plaintiff as to the manner of the injury.

There was evidence on behalf of the defendant that the plain-

18 A. & E. R. Cas.—18.

tiff told one Greiner, shortly after the accident, "that he wanted to get off at West street; the train slacked up and he was on the platform and wanted to get off, and just at the moment he was going to get off they pulled out at full speed, and the pull threw him off." This conversation was denied by the plaintiff.

The foregoing testimony was all that gave a description of the manner of the injury. It certainly has no tendency to prove wilfulness. There is no element of wilfulness in it. *Indianapolis, etc., R. R. Co. v. McClure*, 26 Ind. 370. As it was necessary, under the allegations of the complaint, to prove a wilful injury in order to recover, it follows that the verdict was not sustained by sufficient evidence. The court, therefore, erred in overruling the motion for a new trial. As this result will require the reversal of the judgment, we need not consider the other reasons for a new trial.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be, and the same is hereby, in all things, reversed, at the costs of the appellee, and this cause is remanded for a new trial.

Passengers Riding on Car Platforms.—Upon the question how far the act of a passenger in riding upon the platform of a moving car amounts to contributory negligence, See *Alabama Great Southern R. Co. v Hawk*, and note, *infra*.

ALABAMA GREAT SOUTHERN RAILWAY Co.

v.

HAWK.

(72 *Alabama Reports*, 112.)

A regulation forbidding passengers to stand on the platform of a car while the train is in motion being reasonable and proper, a passenger who is injured while standing on the platform, in violation of such regulation, is guilty of contributory negligence, and cannot maintain an action to recover damages for such injuries.

The statutory provisions requiring the engineer, or other person in charge of a moving train of cars, to blow the whistle or ring the bell on approaching a depot or stopping-place, are intended for the protection of the traveling public, or persons not on the train; and passengers on the train are not, ordinarily, included in the letter or spirit of the statute, and cannot complain of its violation, when suing for damages on account of personal injuries, to which the failure to ring the bell could have had no tendency to contribute; though cases may occur, possibly, in which passengers or other persons permissively on the train are entitled to have such signals given as a warning to hasten their departure.

The limitation of an action against a railroad company, to recover damages for personal injuries, is one year; and in determining when the

action was commenced, the date or form of the summons is not conclusive, it being amendable in these particulars on proper evidence.

It is the duty of the court to determine whether the summons is an original or an *alias*, and a charge which refers the decision of that question to the jury is erroneous.

In an action against a railroad company to recover damages for personal injuries sustained by a passenger, a witness for the plaintiff cannot be allowed to testify that the conductor, "a few minutes after the plaintiff had been hurt, asked the engineer why he did not respond to the bell-call; and that the engineer answered, he did respond to all the bell-call he heard." Such declarations are not part of the *res gestæ*.

APPEAL from the Circuit Court of DeKalb.

Tried before the Hon. Leroy F. Box.

This action was brought by James M. Hawk against the appellant, a domestic corporation, to recover damages for personal injuries sustained by the plaintiff by being thrown, or falling, from the platform of a passenger car at Valley Head, to which station he had traveled as a passenger from Fort Payne, another station on the defendant's road, on the 10th of December, 1879. The defendant pleaded: 1st, not guilty; 2d, "that the injuries to plaintiff now complained of, if any he received, would not have occurred without his fault or negligence, and that his fault and negligence contributed, proximately and directly, to produce said injuries, and said injuries were not the result of any wanton, reckless or intentional act done by this defendant, its agents or servants;" 3d, the statute of limitations of one year. Issue was joined on all these pleas.

The original summons was sued out on the 25th October, 1880; but its service was set aside by the court at the next ensuing term, and leave given to the plaintiff to issue an *alias*; and another writ was issued on the 25th June, 1881, which is in form an original and not an *alias*. On the trial, as the bill of exceptions recites, the defendant offered this last writ in evidence as showing the commencement of the action; and objected to the admission of the former writ when offered in evidence by the plaintiff, "on the ground that the same was illegal, irrelevant and inadmissible under the issues joined." The court overruled this objection and allowed the former writ to go to the jury as evidence; and also permitted the plaintiff to prove that the service of that writ had been set aside by the court, as stated, and leave granted to issue an *alias*. On this evidence, "the court charge the jury, of its own motion, that the summons and complaint dated the 25th June, 1881, was not on its face an *alias* summons and complaint, but that the jury could look to the summons and complaint dated the 25th October, 1880, to see whether that of the 25th June was an *alias*; and if the jury found that this last writ was an *alias*, then the plea of the statute of limitations was avoided." To this charge, and also to the admission of the evidence objected to, exceptions were reserved by the defendant.

The plaintiff testified as a witness for himself, and stated the circumstances under which he was injured, and he introduced two witnesses who were present at the time the accident occurred; while the engineer and the conductor of the train were examined as witnesses for the defendant. There was no conflict in the testimony of these several witnesses as to the material facts which are stated in the opinion of the court. The defendant requested the following charges, which were in writing: 1. "Negligence consists either in doing what a man of ordinary intelligence, care and prudence ought not to do, and would not do, or in omitting to do what a man of ordinary intelligence, care and prudence ought to have done and would have done; and if the plaintiff was guilty of either of these kinds of negligence, and thereby contributed, proximately and directly, to produce the injuries of which he complains in this suit, then the jury ought to find a verdict for the defendant, although they may believe that it was possible for the engineer to have stopped the train precisely at the depot, and that the engineer honestly and in good faith tried to do so, but failed on account of the wet weather." 2. "If the plaintiff by ordinary care and by ordinary observance of the known rules and regulations of the defendant corporation, could and would have avoided the injuries of which he here complains; and if, by his failure to exercise such ordinary care, he contributed proximately and directly to produce the injuries of which he here complains; then, upon this state of facts, the jury ought to find a verdict for the defendant, although they may believe all the evidence as to any alleged negligence of the conductor or engineer." The court refused each of these charges, and the defendant excepted to their refusal. The refusal of these charges and all the other rulings of the court to which exceptions were reserved, are now assigned as error.

Rice & Dobbs, for appellant.

Dunlap & Dortch, contra.

SOMERVILLE, J.—The action here is for an injury to the person of the plaintiff, which resulted from his being accidentally thrown, or having fallen, from the platform of a passenger car of the defendant railroad company. The plaintiff charges the injury to the negligence of the defendant's servants, and the defense interposed is the negligence of the plaintiff himself, which is alleged to have proximately contributed to the injury.

It was justly observed by this court, in *Memphis & Charleston Railroad Co. v. Copeland*, 61 Ala. 376, that the doctrine of contributory negligence "is too firmly rooted in our jurisprudence to be open to further controversy." Its underlying principle is, that no man should, ordinarily, be permitted to recover for a tort or wrong to which his own want of care has directly or proxi-

mately contributed. The reason is, that if, by his failure to exercise ordinary care, he might have avoided the consequences of the defendant's negligence, the plaintiff is regarded as the author of his own wrong. It is commonly observed that to allow the plaintiff to recover in such a case would be to give him damages for the proximate consequences of his own negligence. *Tanner v. L. & N. R. R. Co.*, 60 Ala. 621; *M. & C. R. R. Co. v. Copeland*, 61 Ala. 376, *supra*; *Shearman & Redfield on Negligence*, Sec. 24; *Wood's Mayne on Damages*, 96; *Wharton on Negligence*, Secs. 300-301; *Gothard v. Ala. Gr. S. R. R. Co.*, 67 Ala. 114.

There are certain qualifications of this rule, which are fully discussed in the case of *Tanner v. L. & N. R. R. Co.*, 60 Ala. 621, *supra*, and were followed by this court in subsequent rulings; *Cook v. Central R. R. and Banking Co.*, 67 Ala. 533; *Gothard v. Ala. Gr. S. R. R. Co.*, 67 Ala. 114, *supra*. There is no evidence in this record tending to show that the injury suffered by the plaintiff was brought about by any act of the defendant, which was wanton, reckless, or intentional. If such had been the case, the defendant would have been liable, notwithstanding the plaintiff's want of ordinary care. Nor is there any evidence tending to prove that the peril of the plaintiff was manifested to the servants of the defendant company in time to have averted the catastrophe by the exercise of preventive effort on their part. The injury occurred simultaneous with or prior to the discovery of the plaintiff's danger. Hence, the modifications of the general doctrine of contributory negligence, as recognized in the cases last above cited, have no room for application to the case at bar. *Price v. St. Louis R. R. Co.*, 3 Am. & Eng. R. R. Cas. 365; *Little Rock, etc., R. R. Co. v. Parkhurst*, 5 *Id.* 635.

The facts of the present case seem clear and undisputed. The plaintiff was a passenger on the regular passenger train of the defendant company, and had paid his fare to Valley Head, an established station on the line of the Alabama Great Southern Railroad. There was a down grade in approaching this depot, and the track was wet from rain, in consequence of which the cars composing the train were carried by the engine twenty-five or thirty yards beyond the customary stopping-place. The conductor signalled the engineer to back the train to the depot, which he did, as is shown to have been usual on such occasions. The whistle had been sounded about half a mile before approaching the station; but this was not continued, nor does it appear that the bell was rung while thus approaching. It is shown to have been towards night, on the 10th day of December, 1879, and was "dark, raining, and cloudy." When the engineer sounded the whistle, as a signal of approach to Valley Head station, or very soon after, the plaintiff, according to his own testimony, "*went out of the passenger car on to its platform, and remained there until the train, at a reduced*

rate of speed, *passed the depot*," when he was precipitated or fell from the platform, so as to render him temporarily unconscious. How the accident happened the plaintiff was unable to state. The regulations of the railroad company forbade passengers to stand on the platform while the trains were in motion. The rate of speed at which the train was moving, when it passed the depot, was from three to five miles an hour.

It is manifest that the plaintiff would not have been injured, but for his own co-operating negligence. Standing upon the platform while the train was in motion in the dark, was a want of ordinary prudence, which contributed directly to the injury suffered. The regulation of the company forbidding this was a reasonable one, and its violation by the plaintiff was a want, on his part, of ordinary care under the circumstances. If passengers traveling on railroad trains insist upon thus exposing themselves unnecessarily to danger, they must do so at their own peril, and not at the peril of the railroad companies. *Hickey v. Boston, etc., R. R. Co.*, 14 Allen, 429; *Quinn v. Illinois, etc., R. R. Co.*, 51 Ill. 495; *Railroad Co. v. Jones*, 95 U. S. 439.

The court erred in refusing to give the charges numbered one and two, requested by the defendant, which were but clear recognitions of the above enunciated principles.

Whether the engineer was *ringing a bell* on approaching the depot, was not material. The statute, it is true, provides this signal to be given, or else for the whistle to be blown at intervals, until the train reaches the depot or stopping-place; also, before entering any curve crossed by a public road, on a cut where the engineer cannot see at least one-fourth of a mile ahead, and upon entering into the corporate limits of any town or city. Code, 1876, Sec. 1697. And a railroad company is made liable for all damages done to persons, stocks, or other property, *resulting from a failure to comply with these requirements*. Code, Sec. 1700. These precautions, so far as applicable to persons, are intended obviously for the benefit of the traveling public, and others who have a right to be warned of approaching trains, for their personal protection against injury. Passengers who are on the trains are not ordinarily included in the letter or spirit of the statute. They do not need such signals of warning for their protection, and they cannot, therefore, be construed to be entitled to them. *South & North Ala. R. R. Co. v. Thompson*, 62 Ala. 494; *Railroad Co. v. Bowdrow*, 92 Penn. St. 475; s. c. 2 Am. & Eng. R. R. Cas. 30. The failure to ring a bell at the time of the injury to the plaintiff, could have had no tendency to contribute to such injury. We can see no logical connection between this negligence of the defendant and the alleged damage suffered by the plaintiff. The court erred, therefore, in permitting the plaintiff to testify that no bell was rung by the engineer as the train was approach-

ing the depot at Valley Head, at the time of the alleged injury. It may be proper to add that cases may possibly occur where passengers or other persons permissively on a train are entitled to have such signals given as a warning to hasten their departure from a train immediately before leaving a depot or stopping-place, as the statute requires to be done. Code, Sec. 1699; *Doss v. M. K. & T. R. R. Co.*, 59 Mo. 27.

The present action, being a claim for damages on account of a personal injury, is governed by the statute of limitations of one year. *M. & M. Railway Co. v. Crenshaw*, 65 Ala. 566. The date of the summons, however, was not conclusive evidence of the time of the commencement of the action. Nor was the form of the summons conclusive of its character as an *original*, or an *alias*. Even if in form an original, such process "may be amended on proper evidence so as to show it is in fact an *alias*." *Huss v. Central R. R. & Banking Co.*, 66 Ala. 472; *Steamboat "Farmer" v. McCraw*, 31 Ala. 659. The court erred in referring this question to the jury. It was a matter of law for its own determination. *Jones v. Pullen*, 66 Ala. 306; *Taylor v. Kelly*, 31 Ala. 59; *Price v. Mazange*, *Id.* 701.

The objection interposed to the testimony of the witness, Allison, should have been sustained. This witness was permitted to testify to the jury that "a few minutes after the plaintiff had been hurt, the conductor asked the engineer, *why he did not respond to the bell-call*; and the engineer answered, that *he did respond to all the bell-call he heard*." To the admission of this evidence the defendant duly excepted.

The rule is well established that it is not within the scope of an agent's authority to bind his principal by admissions having reference to by-gone transactions. The only ground upon which the admissibility of an agent's declarations can be justified, is that they must have been made while in the discharge of his duties as agent, and be so closely connected with the main transaction in issue as to constitute a part of the *res gestæ*. *Mobile & Mont. R. R. Co. v. Ashcraft*, 48 Ala. 15; *Tanner's Ex'r v. L. & N. R. R. Co.*, 60 Ala. 621; *Robinson v. Fitchburgh & W. R. R. Co.*, 7 Gray, 92; *Baldwin v. Ashley*, 54 Ala. 82; 1 Brick. Dig. p. 63, Secs. 160-162.

It is difficult, if not impossible, to accurately define the principle of *res gestæ*, as it is often called. It is commonly said to have reference to such circumstances and declarations as are *contemporaneous* with the main fact under consideration, and so closely connected with it as to illustrate its character. 1 Greenl. Ev. Sec. 108. What lapse of time is embraced in the word "contemporaneous," is often a question of difficulty. Perfect coincidence of time between the declaration and the main fact is not, of course, required. It is enough that the two are substantially contempo-

aneous; they need not be literally so. The declarations must, however, be so proximate in point of time as to grow out of, elucidate, and explain the character and quality of the main fact, and must be so closely connected with it as to virtually constitute but one entire transaction, and to receive support and credit from the principal act sought to be thus elucidated and explained. The evidence offered must not have the earmarks of a device or afterthought, nor be merely narrative of a transaction which is really and substantially past. Thompson on Carriers of Passengers, pp. 557, 558; Gandy v. Humphries, 35 Ala. 617; Henderson v. The State, 70 Ala. 23; Enos v. Tuttle, 3 Conn. 250; Scraggs v. The State, 8 Sm. & M. 722; Com. v. Hackett, 2 Allen, 136; Luby v. Hudson R. R. Co., 17 N. Y. 131; Ewell's (Evans) Agency, 219-220; McDermott v. Hannibal, etc., R. R. Co., 73 Mo. 516; s. c. 2 Am. & Eng. R. R. Cas. 85.

In Thompson v. Travention (Skinner, 402), it was ruled "that what the wife said immediately upon the hurt received, and before she had time to devise or contrive anything for her own advantage," might be given in evidence under this principle. In Luby v. Hudson River R. R. Co., 17 N. Y. 131, *supra*, the declarations of the driver of a street car made after an accident had occurred and the car had been stopped, but before he had left it, to the effect that he could not stop the car because the brakes were out of order, were ruled to be mere hearsay and inadmissible.

In Adams v. Hannibal, etc., R. R. Co., 74 Mo. 553; s. c. 7 Am. & Eng. R. R. Cas. 414, the court, for a like reason, excluded the declarations of the engineer and fireman of the train, made immediately after the deceased was struck and the train was stopped, showing that the accident was occasioned by the negligence of the engineer. The case is clearly analogous to the present one, and the views of the court, after a clear and instructive review of the cases, fully accord with the conclusion reached by us and the reason upon which that conclusion is based. Our conclusion is that the declarations of the conductor and engineer cannot, under a proper application of this principle, be regarded as a part of the *res gestæ* of the accident resulting in the injury to plaintiff. The time—"a few minutes"—does not appear to be so proximate to the main transaction, nor are the declarations made otherwise so closely connected with it, as an elucidating circumstance, as to justly authorize the conclusion that they are not merely narrative of a past occurrence, which at the moment was finished and complete. Thompson on Carriers of Passengers, pp. 557-8; Packet Co. v. Clough, 20 Wall. 528, 540; Morse v. C. R. Railroad Co., 6 Gray, 450; Michigan, etc., R. R. Co. v. Carrow, 73 Ill. 348; 1 Brick. Dig. p. 843, Secs. 553-555; Gandy v. Humphries, 35 Ala. 617.

The judgment of the circuit court is reversed, and the cause remanded.

How Far Act of Passenger in Standing on Platform of Moving Steam Car Amounts to Contributory Negligence.—Standing upon the platform of a car operated by steam, while the same is in motion, has ordinarily been held to amount to contributory negligence, *per se*. *Quinn v. Illinois Central R. R. Co.*, 51 Ill. 495; *Hickey v. Boston & Lowell R. Co.*, 14 Allen, 429; *Macon & W. R. R. Co. v. Johnson*, 38 Ga. 409. And see *Higgins v. New York & Harlem R. Co.*, 2 Bosw. 133.

But whether or not such conduct amounts to contributory negligence is under some circumstances held to be for the jury. *Colegrave v. Harlem & N. H. R. Co.*, 6 Duer, 383; s. c. 20 N. Y. 492; *Willes v. Long Island R. R. Co.*, 34 N. Y. 670; *Collins v. Albany & Schenectady R. R. Co.*, 12 Barb. 492.

In some few cases the circumstances have been such as to free the party altogether from the imputation of contributory negligence. *Truax v. Erie R. Co.*, 4 Lans. (N. Y.) 198; *Bull v. N. Y. Central R. R. Co.*, 31 N. Y. 314.

How Far Act of Passenger in Standing on Platform of Moving Street Car Amounts to Contributory Negligence.—When a passenger rides upon the platform of a street car, and all the seats and standing room being full, it is generally a question for the jury whether he is or is not guilty of contributory negligence. *Meesel v. Lynn & Boston R. R. Co.*, 8 Allen, 234; *Spooner v. Brooklyn City R. R. Co.*, 54 N. Y. 230; *Augusta & Summerville R. R. Co. v. Renz*, 55 Ga. 126; *Hardencamp v. Second Ave. R. R. Co.*, 1 Sweeny, 490; *Germantown Pass. R. R. Co. v. Walling*, 2 Am. & Eng. R. R. Cas. 20; *Ginna v. Second Ave. R. R. Co.*, 67 N. Y. 596; *People's Pass. R. Co. v. Green*, 6 Am. & Eng. R. R. Cas. 168.

It seems also according to some authorities that even if the interior of the car is not full, the question of contributory negligence is equally one for the jury. *Nolan v. Brooklyn City, etc., R. R. Co.*, 3 Am. & Eng. R. R. Cas. 463; *Seigel v. Eisen*, 41 Cal. 140; *Maguire v. Middlesex R. R. Co.*, 115 Mass. 239.

But where there is special and obvious danger it is contributory negligence, *per se*, to ride on the platform of a street car when there is room inside. *Wood v. Central Park R. R. Co.*, 11 Abb. Pr. (N. S.) 411. It is in like manner contributory negligence, *per se*, to elect to ride on the platform in violation of a notice forbidding passengers to do so. *Baltimore City Pass. Ry. Co. v. Wilkinson*, 30 Md. 224. See also *Brown v. Congress & Baker Sts. R. Co.*, 8 Am. & Eng. R. R. Cas. 388; *Downie v. Hendry*, 8 Am. & Eng. R. R. Cas. 386. In both of which cases the conduct of the passenger has been held to amount to contributory negligence, *per se*.

In some cases the circumstances have been such that the plaintiff has been held, as matter of law, not guilty of contributory negligence in riding upon the platform. This is the case where he has been pushed there. *Sheridan v. Brooklyn & Newtown R. R. Co.*, 36 N. Y. 39. Or when he is permitted expressly or impliedly by the servants of the company to ride there. *Clark v. Eighth Ave. R. R. Co.*, 36 N. Y. 135; *Burns v. Bellefontaine R. R. Co.*, 50 Mo. 139. But the granting of permission by the servants of the company will not authorize a passenger to stand on the platform when there are notices posted up warning him not to do so, and a statutory provision exempting the company from liability in such case. *Higgins v. N. Y. & Harlem R. R. Co.*, 2 Bosw. (N. Y.) 133.

Lack of Casual Connection between Contributory Negligence and Injury.—Where there is no casual connection between the fact of being on the platform and the injury done, contributory negligence cannot be set up as a defence. *Lafayette & Ind. R. R. Co. v. Sims*, 27 Ind. 59; *Thirteenth & Fifteenth Sts. Pass. Ry. Co. v. Boudrow*, 2 Am. & Eng. R. R. Cas. 30.

Failure to Catch Hold of Support while Standing on Platform Amounts to Contributory Negligence.—The failure on the part of a passenger standing on the platform of a car to catch hold of some support amounts to contributory negligence, *per se*. *Ginna v. Second Ave. R. R.*

Co., 67 N. Y. 596; Camden & Atlantic R. R. Co. v. Hoosey, 6 Am. & Eng. R. R. Cas., 454. Or is at least a question for a jury. Fleck v. Union R. Co., 16 Am. & Eng. R. R. Cas. 872.

Declarations of Servants.—As to the admissibility of declarations on the part of servants of the company in regard to the cause of an accident, see *Patterson v. Wabash, St. L. & P. R. Co.*, and note, *supra*, where there is a full citation of authorities.

DAHLBERG

v.

MINNEAPOLIS STREET RAILWAY CO.

(*Advance Case, Minnesota, November 12, 1884.*)

A street railway company, as a carrier of passengers, is bound to exercise the highest care in the management of its cars in approaching and passing structures and obstacles in the street situated unreasonably close to the track.

The position which a passenger in a street car may reasonably be allowed to assume, when taking or occupying a seat, is subject to no arbitrary rule. He is to exercise a degree of care commensurate with the danger to which he may be exposed, and such as men of common prudence would exercise in a like situation, having regard to all the circumstances, and considering the probability that the carrier will exercise due care; but the degree of care to be exercised in any particular case is usually a question of fact for the jury.

Where a passenger in a street car, while in the act of taking his seat, rested his hand on and partially over the base of an open window, and the same was immediately struck and injured by upright sewer plank standing in close proximity to the passing car, *held*, that the question of contributory negligence on his part was for the jury.

APPEAL from an order of the district court, Hennepin county, denying defendant's motion for a new trial.

Merrick & Merrick, for respondent.

Wilson & Lawrence, for appellant.

VANDERBURGH, J.—This action is for damages for injuries received by plaintiff while a passenger upon one of the defendant's street cars, in the city of Minneapolis. The accident occurred from the contact of plaintiff's hand, which was partly outside the open car window, with upright planks placed by the city near the track while in the construction of a sewer across the street and under the track. The evidence is conflicting as to the degree of proximity of the sewer planks to the body of the passing car, but we think there was evidence in plaintiff's behalf for the jury, tending to show that the car ran very close and within less than an inch of them. These planks were erected each side of the sewer, about three feet apart, and were for the purpose of preventing the earth from caving in during the progress of the work.

The plaintiff states in his testimony that he entered the car, proceeded to the front to pay his fare, got change in an envelope, went back and sat down, and says: "I put my hand like this on the window" (illustrating by his hand on the arm of a chair with the fingers on the outside); "I was hardly sitting down before I was struck by the planks." He also testifies that his hand was caught and turned around by the first plank and his arm broken by the second plank, and that his hand was first struck on the knuckles. "The car was going pretty fast—trotting." On cross-examination he said: "I walked back from the front of the car to the second window; I had the envelope in my fingers and put it out; I did not throw it out; I put my hand out just far enough to let the envelope out; I was partly sitting down before I was struck with the first plank; my hand was caught just as I sat down." The sewer planks had just been put up, and the driver of the car had not previously passed them. He had sole control and management of the car, and according to plaintiff's evidence, he did not stop or slacken its speed on approaching the sewer. It does not appear that plaintiff had any notice of the obstruction.

The defendant, as a carrier of passengers, was bound to exercise extraordinary care, and liable for slight neglect, and the question of negligence in the management of the car on approaching an obstacle which might graze or come in such close proximity to the car as to be dangerous, would naturally be for the jury, and we think it was properly submitted to them in this case; for, independently of contributory negligence on the part of a passenger, he might, by a jolt of the car or for other justifiable reason, temporarily expose a hand or limb beyond the limits of the car and be injured. *Dickinson v. Railroad Co.*, 18 N. W. Rep. (Mich.) 554.

The principal question in the case is presented by the defendant's exceptions to the rulings of the court upon the question of the plaintiff's alleged contributory negligence in temporarily extending his hand or fingers over the edge of the window sill. The court charged the jury "that, as a general proposition of law, if a man should thrust his hand outside of a car window carelessly and negligently, so as to come in contact with an object which was at a reasonably safe distance from the car and should be injured, and he would not have been injured but for that negligent act on his own part, he could not recover at all." But if the plaintiff simply put his hand upon the window-sill as he sat down, and as described in plaintiff's testimony, the windows being open, though his fingers were beyond and outside of the window, "if the accident occurred in that way and that was all he did," it was not, in the opinion of the court, negligence in law. The court further instructed the jury that he was bound to do what a person of ordinary prudence would do and nothing more, and "he is liable for

contributory negligence if he did in this instance what a person of full age and discretion, and ordinary intelligence, care and prudence, should not have done." The court, therefore, left the question to the jury, and refused to charge the jury, as requested by defendant's counsel, that if the jury believed that the plaintiff's arm or hand was outside the window when the injury occurred he could not recover.

We are not prepared to say, assuming plaintiff's version of the case to be true, that the court erred in holding that, if the conduct of plaintiff was negligent, it was an inference to be drawn by the jury and not by the court. By this the court did not imply that plaintiff's conduct was not negligent, but that it was not necessarily or conclusively such. A very careful or thoughtful person would be likely to refrain from such an act, while it is not so clear that in the judgment of a majority of ordinarily prudent men the conduct of the plaintiff, as testified to by him, would, in itself, be careless or unauthorized. A passenger is to be allowed a reasonable measure of liberty in the position assumed by him in taking or occupying his seat. He is expected to exercise care commensurate with the danger to which he may be exposed; but the degree of care to be exercised on a particular occasion is generally a question of fact for the jury. *Stackus v. Railroad Co.*, 79 N. Y. 467. Thus, whether the act of standing on the platform of a street car, or of getting on or off such car while in motion, is negligence, is held usually to be for the jury under the circumstances of each case. *Whart. Neg.* 365, 370; *Meesel v. Railroad Co.*, 8 Allen, 234; *Eppendorf v. Railroad Co.*, 69 N. Y. 195; *Shear. & R. Neg. Sec.* 282. So, in *Brophy v. Germantown R. Co.*, 16 Am. & Eng. R. R. Cas. 361, it was held not negligence, *per se*, for a passenger to rest his arm on a window-sill, "which is substantially the top of the back of the seat," whence, by a jolt of the car, his arm was thrown out of the window and injured, the court saying: "In the absence of collision with an external object his arm was in no danger of injury. He was under no legal obligation to assume or anticipate that the company would run another car against the one in which he was sitting." But if, instead of resting his arm on the window-sill, he had taken hold of it as did the plaintiff, his hand extending, say, less than an inch beyond the car, the same suggestion might be made (notwithstanding the additional fact) in considering the question of negligence. *Whart. Neg., Sec.* 362; *Hutch. Carr. Sec.* 659; *Thomp. Carr.* 258; *Fordham v. Railroad Co.*, L. R. 3 C. P. 372; *Ang. Carr.* (5th Ed.) 514, note; *Seigel v. Eisen*, 41 Cal. 109; *Miller v. St. Louis R. Co.*, 5 Mo. App. 471; *Spencer v. Railroad Co.*, 17 Wis. 487. That is to say, whether the position or conduct of the passenger in such cases is reasonably prudent considering the circumstances, and the probability that the carrier will exercise due care, is not necessarily a question

for the court (though in clear cases it of course would be), but may be and ordinarily is for the jury.

It must also be considered that in order to the successful operation of cars there must be a reasonable space on each side between them, and any structures or obstacles in the street to accommodate their movements, caused by irregularities or impediments on the track, and that as respects danger from collision with such structures, it is ordinarily easily averted in the case of street cars, which run at a moderate rate of speed, and are readily controlled. *Lynam v. Union R. Co.*, 114 Mass. 88; *Thomp. Carr.* 258, 446. The question of the passenger's negligent conduct must be largely affected by the circumstances of each case, including any indications of danger from obstructions or interruptions from whatever cause, which might influence the conduct of a prudent person. But in *Todd v. Railroad Co.*, 3 Allen, 18, 7 Allen, 207, it was unqualifiedly ruled that voluntarily suffering an arm or any part of it by a passenger to extend beyond the external surface of a car was negligence, *per se*. And in *Pittsburg R. Co. v. McClurg*, 56 Pa. St. 204, it is assumed by the court that such conduct by a passenger is wholly unauthorized and presumptively negligent.

These cases growing out of accidents arising upon steam railways have been followed by the courts of several other States. The same rule was also applied in *Lauderbach v. People's R. Co.*, Pa. Sup. Ct. 1884—a street car case. The hand of a passenger holding onto the window of a car was caught by a colliding car on a narrow street, where the cars necessarily grazed in passing. No reference is there made to any supposed distinction between the case of street and steam railroad cars. The court assumed that the protruding hand or arm is in an unlawful place if in any degree outside of the car by the voluntary act of the party, thus cutting off discussion as to whether in the absence of any regulations on the subject, such conduct in a passenger would be condemned as careless by men of ordinary prudence. The opposite doctrine is maintained as to street cars, in *Miller v. Railroad Co.*, *supra*; *Seigel v. Eisen*, *supra*. We do not undertake to speak as to the application of the rule to other than street railways, but confining ourselves closely to the facts of this case as presumptively found in plaintiff's favor by the jury, we are of the opinion the case was properly submitted to them.

It appeared that the plaintiff was a laboring man, and had been laid up for some weeks and unable to do anything. These facts were proper for the jury to consider, in respect to the extent and character of the injury, in their general estimate of damages. No claim for special damages was made in that behalf.

Order affirmed.

Passenger Sitting with arm Projecting from Window.—In general it has been held that the act of a passenger in allowing his arm to project from

the window of a car amounts to such contributory negligence as will bar his right of recovery. *Pittsburgh, Connellsville R. R. Co. v. McClurg*, 56 Pa. St. 294; (overruling *Laing v. Colder*, 8 Pa. St. 479, and *New Jersey R. R. Co. v. Kennard*, 21 Pa. St. 203; *Moore v. Mississippi V. L. J. Co.*, 4 Bush, 485; *Louisville & Nashville R. R. Co. v. Sickings*, 5 Bush, 1; *Winters v. Hannibal & St. Joe R. Co.*, 39 Missouri, 486; *Holbrook v. Utica & Schenectady R. R. Co.*, 12 N. Y. 286; *Pittsburgh, etc., R. R. Co. v. Andrews*, 39 Md. 329; *Todd v. Old Colony & Fall River R. Co.*, 8 Allen, 18; s. c. 7 Allen, 207; *Indianapolis, etc., R. R. Co. v. Rutherford*, 29 Ind. 82; *Dun v. Seaboard & Roanoke R. R. Co.*, 16 Am. & Eng. R. R. Cas. 363.

In some cases it has been held that the question of a party's contributory negligence in such case is for the jury. *Chicago & Alton R. Co. v. Pendram*, 51 Ill. 838; *Sponter v. Milwaukee, etc., R. Co.*, 17 Wisc. 487.

Passengers with arm on sill of Window.—For a passenger to lean his arm upon the sill of the window without allowing it to project from the car is not contributory negligence. *Farlow v. Kelly*, 11 Am. & Eng. R. R. Cas. 104. Or at least not contributory negligence *per se*, the question being for the jury. *Germantown Pass. R. Co. v. Brophy*, 16 Am. & Eng. R. R. Cas. 861.

WESTERN MARYLAND RAILROAD COMPANY.

v.

STANLEY.

(61 *Maryland Reports*, 266.)

In an action against a railroad company by a passenger to recover for injuries sustained, the plaintiff's evidence must be assumed to be true, in considering the question whether there was sufficient legal evidence to sustain a recovery.

In passing through a long tunnel lights are necessary, and the windows, doors and ventilators should be closed. But it does not follow that an officer should be provided for every car, or that the omission to shut out the gas and smoke, would, of itself, give the right to passengers to sue for the discomfort and annoyance.

A passenger sitting close to the front door of a crowded car, when passing through a tunnel, attempted to shut the door while the car was in total darkness, in order to keep out the smoke and cinders, and in doing so was injured. In an action for damages brought by him against the railroad company, it was *Held*:

1st. That all the facts and circumstances taken together would warrant the finding of negligence on the part of the defendant, and justify a verdict for the plaintiff, unless the plaintiff's conduct amounted to contributory negligence.

2d. That the court below properly refused to instruct the jury that the plaintiff was chargeable with contributory negligence.

APPEAL from the Baltimore City Court.

The case is stated in the opinion of the court.

Exception. At the trial the plaintiff offered the two following prayers:

1. That if the jury believe, that at the time referred to, the plaintiff had paid his fare, and was a passenger on a train on the

road of defendant, that it was then the duty of the defendant, so far as the management and movement of its train was concerned, to use all reasonable means in its power to avoid subjecting the plaintiff to discomfort and annoyance; and if they find that, at the time referred to, the door of the car in which plaintiff was seated was open, and that large quantities of cinders and smoke from the engine of said train were coming through said door, and that plaintiff, and all others in said car, were suffering great discomfort and annoyance therefrom, and that no employé of the defendant was then and there present to shut said door, that then the plaintiff had a right to close the same, in a reasonable and prudent manner; and if they find that he received the injuries testified to, while attempting to close said door, and that in so attempting to close the same, he acted with such care and prudence as men of ordinary care and prudence would exercise under similar circumstances, then he is entitled to recover, provided they find that said door was open, and said injuries happened by reason of the failure of the defendant to use reasonable and ordinary precautions and discipline in the management of its said train at that time.

2. That if the jury find for the plaintiff, then in estimating the damages to which he is entitled, the jury should consider the mental and physical suffering to which he was subjected, by reason of said injuries, the health and condition of the plaintiff before the injuries complained of, as compared with his present condition, in consequence of said injuries, and whether said injuries are, in their nature, permanent; and also such loss of business as they may find resulted directly from said injuries, as well as such expense as they find he may have incurred for surgical treatment therefor, and he is entitled to recover such damages as the jury may find would be a fair and reasonable compensation for such injuries and suffering.

And the defendant offered the two prayers following:

1. That there is no sufficient legal evidence in the cause of such negligence on the part of the defendant or its agents, as would entitle the plaintiff to recover, and the verdict of the jury must be for the defendant.

2. That upon the undisputed facts of the case, it is apparent that the plaintiff contributed to the happening of the injury complained of in the declaration by his own want of ordinary care, and therefore the plaintiff is not entitled to recover.

The court (Stewart, J.) granted the prayers of the plaintiff, and refused those of the defendant. The defendant excepted, and, the verdict and judgment being against it, appealed.

Thomas W. Hall, for the appellant.

Albert Ritchie, for the appellee.

LEVING, J.—The appellee sued the appellant in Baltimore City

Court for injuries sustained whilst he was a passenger on appellant's road, by reason of the negligence of the appellant.

Two questions only are presented for determination. The appellant offered two prayers. First, that there was no legally sufficient evidence of negligence on the part of the appellant; and second, that upon the undisputed facts the appellee was guilty of contributory negligence which barred his recovery. The court rejected these prayers, and granted the appellee's two prayers, the first of which recited the facts deemed necessary to be found by the jury, to find for the plaintiff, and the other laying down the measure of damages in case they found for the plaintiff. No objection is made to the form of either of these prayers of the plaintiff, if the court considers there was evidence legally sufficient to take the case to the jury.

There is some conflict in the testimony in respect to some of the facts, on which the appellee bases his right to recover; but as it is a question of whether there was sufficient legal evidence to sustain recovery, if believed by the jury, it is only necessary to state the plaintiff's own testimony; for it must be assumed to be true for the purposes of this decision. He states that he took passage to the race grounds at Pimlico, in a special train of the appellant, which was run from its principal station, Hillen Station, in the city of Baltimore, on the 20th of October, 1882; that he took the train, after buying his ticket, about noon; that the seat he occupied was a front seat in the car next to the aisle, on the left hand side of the aisle, the door opening toward that side; that he was near enough to the door to touch it, when opened, with his foot; that all the seats in the car were filled, and there were persons standing in the aisle and on the platform; that the train was very long and the whole of it was packed and crowded; that soon after the train started it entered the Baltimore & Potomac Railroad tunnel, when it became pitch dark in the car, there being no lights on the train; that the door of the car was open, allowing smoke and cinders to enter in great quantities, thereby incommoding the plaintiff and other persons in the car, who shouted "Shut the door;" that the train passed the first section of the tunnel with the door open (and witness thought it was open from the time it left Hillen station) and so passed into the second section of the tunnel, which was very long; that the smoke and cinders were coming from the engine in large quantities, and that witness was choking from them, and all had suffered very much; that it was still pitch dark in the car, and persons were calling out "Shut the door;" that the door was not shut, nor was there any employé of the company in the car to respond to the request; that thereupon the plaintiff rose carefully from his seat for the purpose of shutting the door, extending both hands before him carefully, and feeling in the darkness for the door; that just then there was a

swaying of the door, and it was thrown back against the plaintiff's right hand, and his right arm passed through the glass of the upper part of the door, cutting it very severely in many places, the most severe being across the wrist; whether the swaying of the door was caused by the motion of the car, or by some person on the outside of the door, witness could not tell; that this happened just after the passing an opening in the tunnel, at which break the light was sufficient to enable him to see the door was open, and that there were persons standing in and about the doorway, some on the inside and some on the outside; that nothing could be done after the accident, because it was pitch dark, and nobody knew what had occurred; that feeling himself bleeding, he could only grasp his arm with his left hand and try to stop the blood till the train got into the light, when persons came to his assistance; that the train went through the tunnel "very slowly; it fairly crept;" and it was so heavy, some distance out of town it stopped, and was divided because it was so heavy; that since the accident he has been deprived of the free use of his right hand, besides suffering great pain, and being subjected to great expense for medical attendance, etc.

It appeared in the proof of the defendant that the running time for the passage of the tunnel was from six to seven minutes. This is a sufficient summary of the evidence for our purpose, and assuming its truth, we think there was no error in refusing to take the case from the jury because of the reasons stated in either of the prayers of the defendant.

There can be no doubt that it is the duty of railroads for the conveyance of passengers to take proper precautions in the management, appointments, and discipline of their trains, to secure the safety and reasonable comfort of their passengers. The passenger pays his fare, and in consideration thereof the company engages to take him to his destination with due care for his appropriate comfort and safety consonant with the exigencies of that kind of travel. The company knew the train had to pass through the tunnels of the Baltimore & Potomac Railroad. Lights were necessary for such a totally dark transit. The necessities of passengers might require light during the passage of them. No argument is needed to prove this. The officers of the train, testifying for the defendant, say there were lights in all the cars; but this is a question of evidence, and the plaintiff and another passenger say there were none.

The imperative necessity for closing the windows, doors, and even the ventilators when passing through tunnels, to prevent the otherwise inevitable discomfort from the smoke, cinders and gas, is notorious. The ordinary practice of the company to do that before entering a tunnel, as proved by the defendant's own witnesses, establishes the importance of such precaution. There were

ten passenger coaches and but two conductors and two brakemen on the train. When the cry was made to "shut the door," there was no officer in the car to comply with the passengers' request, and the plaintiff was impelled by his discomfort to attempt to do it himself. Whilst we do not think or mean to say that an officer should have been provided for every car, or that the omission to shut out the gas and smoke would of itself have given a right to passengers to sue for the discomfort and annoyance, yet we think all the recited facts and circumstances taken together, if found by a jury, would warrant the finding of negligence on the part of the defendant, and justify a verdict for the plaintiff, unless the plaintiff's conduct amounted to contributory negligence. This the court was asked by the defendant to say, as a matter of law, the plaintiff's action was, and barred recovery. We think the court below committed no error in declining to so instruct the jury. The plaintiff was sitting nearest the door, and was, therefore, subjected naturally to more discomfort than fellow passengers in remote parts of the car. He received its full force and volume, as it came rushing in, before it diffused itself over the car. It choked him. Self-preservation prompted him to shut it out. It cannot be that a man, under such circumstances, feeling himself suffocating or choking from the smoke, cinders and gas, must sit supinely, and endure, without making any effort to relieve present and prevent further physical pain. Shutting the door was the only remedy, and if, in his effort to do that which the company should have done for him, but did not, he acted with prudence and care, he cannot be regarded as guilty, in law, of such contributory negligence as defeats his action. It is said it was imprudent because he knew there were persons about the door inside and out, and their presence there may have been the immediate cause of the accident. If that were so, it cannot affect the question; for there were no seats for those persons, and it was the duty of the company to have seen that the doorway was not so obstructed by the crowd as to keep it open and inflict this discomfort on passengers, and prevent the doors being shut. The witness did not know he could not shut the door, or he would not have made the effort, we may fairly suppose; and his description of the manner in which he attempted to shut the door, indicates that it was with great care and caution; and the jury have so found; for that question was submitted to them at the plaintiff's own instance, in his first prayer. This is the plain and natural view of the case, and we have direct authority in support of it. In *Gee v. Metropolitan Railway Co.*, L. R. 8 Q. B. 161, Chief Justice Cockburn thus lays down the law: "If the inconvenience is so great that it is reasonable to get rid of it, by an act not obviously dangerous, and executed without carelessness, the person causing the inconvenience by his negligence would be liable for an injury that

might result from an attempt to avoid such inconvenience." If the appellee acted without carelessness or negligence, it is clear he was not culpable. In *Mayor and C. C. of Baltimore v. Holmes*, 39 Md. 249, this court said, negligence is "the want of such care, as men of ordinary prudence would use under similar circumstances." There was certainly evidence from which a jury might reasonably find he did act with such prudence and care as men of ordinary prudence under like circumstances would have acted; and that the appellant had not used reasonable caution in providing for the exigencies of that occasion, and was guilty of such negligence as warranted a verdict for the plaintiff. We have been cited by the counsel for appellant to Sec. 363 of Wharton on Negligence, where the case of *Adams v. Lancashire & Yorkshire Ry. Co.*, L. R. 4 C. P. 739, is cited as establishing in England, that a passenger cannot shut a door, when a conductor could be called on to do it, without incurring the charge of culpably contributory negligence if he should be injured in so doing. Assuming that case would be followed under exactly similar circumstances here (which we do not find it necessary to determine in this case), still the facts of this case take it out of the operation of the rule there laid down; for there was no conductor or other officer to shut it when called on, and the necessity was forced on the appellee to shut it, or endure such inconvenience and discomfort as he ought not to be required to suffer without proper effort to secure relief. But the same section cites approvingly the case of *Gee v. Metropolitan Ry. Co.*, to which we have already referred, where recovery was allowed in a case where a passenger rose up to enjoy a look out from the window, and pushing against a door which was imperfectly and negligently fastened, it flew open and the passenger was injured. That case was not nearly so strong a case for the plaintiff as this is. We cannot see that there was any departure from well-settled principles in the rulings of the court below, or from the authority of any of the cases relied on at the hearing. Finding no error the judgment will be affirmed.

Judgment affirmed.

DISSENTING OPINION.

STONE, J.—I think, in this case, that the plaintiff was clearly guilty of contributory negligence, and was not entitled to recover, and that the court should have so instructed the jury. In arriving at this conclusion, I assume, of course, the evidence on the part of the plaintiff to be true.

The only inconvenience suffered by the plaintiff was from the smoke and cinders which came into the cars while passing through the tunnel. The time occupied by the train in passing through the tunnel was six or seven minutes. The tunnel itself is divided into three sections, with openings between, and at one of the

openings there is a station. When in the tunnel, and when it was dark (no lights in the cars), the passenger left his seat with his hands extended before him in order to shut the door, and the door swaying, either from the motion of the cars or from the act of another passenger, he ran his hand through the glass of the door and cut it.

That his own act caused the injury to the plaintiff must be clear. He was furnished by the company with the seat in their cars, for which he had duly paid, and would have been safely transferred to his destination, *if he had kept that seat.*

The only question to my mind then, is, whether the company gave him sufficient cause to leave his seat. If they did not they cannot be held liable.

The comfort and convenience of a passenger is a very undefined and undefinable matter. Some inconvenience or discomfort is almost inseparable from all travel. Too much or too little warmth, or too much sun or draught, are all subjects of annoyance. But I do not understand, that in order to escape this and kindred annoyances, a passenger is justified in assuming a work that properly belongs to the officers of the train. If he does, he does it at his own risk.

When, however, the discomfort caused by the negligence of those in charge of the train is so great as to endanger the life or health of the passenger, then, if he can do so without manifest risk, he is authorized to endeavor to remedy the evil.

That *some* smoke and cinders penetrate the cars in their passage through a tunnel, is as inevitable as that some air will find its entrance. That the life or health of a passenger can be really endangered by all the smoke or cinders that can enter in the few minutes taken to pass through the tunnel, even if the door of the car be open, is an impossibility in the nature of things. It may be a great discomfort to the passenger but it can be nothing more. While I assume the evidence of the plaintiff to be true, his language must be taken in its ordinary meaning, which is not always the literal one. When he says he "was choking," he can only mean that he was suffering great discomfort from the inhalation of the smoke, etc., and not that his respiration was about to be stopped. This discomfort could have lasted but a very few minutes, and could not have endangered his life or health.

In leaving, therefore, his seat, and attempting to perform the duty of a brakeman, he did so at his own risk, and, as a matter of law, I think there was no sufficient evidence to go to the jury to authorize a recovery.

WHITE

v.

MILWAUKEE CITY RAILWAY CO.

(Advance Case, Wisconsin, November 25, 1884.)

Upon a street railway a separate track was used for the cars going in each direction, and frogs were so placed as to prevent cars, *going in the proper direction*, from being thrown from the track while going upon or leaving a swing-bridge. A loaded wagon having broken down on the bridge upon one of the tracks, a car approaching thereon was necessarily lifted to the other track, and being then driven rapidly upon the bridge, was thrown from the track, injuring a passenger. *Held*, that the company was not negligent in not placing frogs so as to prevent a car thus *going in the wrong direction* upon the track from being thrown off, but that the question whether the speed with which the car was driven upon the bridge was not, under the circumstances, negligent, was for the jury.

In an action for personal injuries the court may, in a proper case, at the trial direct the plaintiff to submit to a personal examination by physicians on behalf of defendant.

To justify the assessment of damages for future or permanent disability, it must appear that continued or permanent disability is *reasonably certain* to result from the injury complained of.

APPEAL from County Court, Milwaukee county.

This action was brought by the plaintiff to recover damages for personal injuries alleged to have been received by her through the negligence of the defendant company, its agents and servants, while riding in one of its street cars. The facts of the case are briefly as follows: The defendant operates two tracks of street railway, running north and south on East Water and Reed streets, in the city of Milwaukee. These streets abut each other at the Menominee river and are connected by a swing-bridge across that river near the Union depot. The tracks are laid upon the bridge. The west track is used exclusively for cars going south, and the east track for those going north. At the time of the injury the plaintiff was a passenger in one of the cars of the defendant going north on the east track on Reed street, which is the street south of the river. A loaded wagon had broken down on the bridge and obstructed that track. The car in which the plaintiff was riding was safely and properly removed to the west track, and just as it was driven upon the bridge the forward wheels left the track. The jolt of the car caused thereby threw the plaintiff from her seat and caused the injury complained of, which was a bruise of one of her limbs below the knee. The ends of the rails of the west track on the south abutment next the bridge were constructed with frogs, which seem to be nothing more than a widening of the rails at the ends. There were also frogs on the ends of the rails

on the bridge next the north abutment thereof. The same rail was used on the east track, the frogs being upon the ends of the rails on the north abutment and on the bridge next the south abutment. Thus it will be seen that whichever way the bridge was turned the location of the frogs was the same. The purpose of these frogs was to overcome the disturbance of the rail by the swaying of the bridge, and to keep the car-wheels on the track when they should strike the bridge or the abutment, although the track might be out of line. It will thus be seen that no precautions were employed in the construction of the tracks with reference to a car running, as did this car, north on the west track.

The testimony given on the trial tends to show that the car was being driven rapidly when it jumped the track. In answer to the question, "What caused said car to leave the track and strike the arch of the bridge?" the jury answered, "Fast driving and the absence of a frog on the west track of the bridge." The jury also found the defendant was negligent and the plaintiff was not; that the plaintiff sustained temporary injury to the right leg, which may prove permanent, and assessed her damages at \$650. A motion for a new trial was denied, and judgment entered for the plaintiff pursuant to the verdict. The defendant appeals from the judgment.

R. K. Adams, for respondent.

Rogers & Mann and *E. P. Smith*, for appellant.

LYON, J.—It is claimed on behalf of the defendant that no sufficient evidence was given upon the trial to support the finding that the defendant was guilty of negligence which caused the injuries complained of. We do not think that negligence can be imputed to the defendant by reason of the manner in which it constructed its railway. The track seems to have been laid in the usual and proper manner, and the frogs placed in the proper positions to keep the cars upon the track when they passed the bridge. In view of the direction in which the cars were moved on the respective tracks, it would be unreasonable to require the defendant to construct its tracks to guard against a contingency such as occurred in the present case. Moreover, it does not appear that the company, in this respect, has violated any of the requirements of its charter, or any order or direction of the authorities of the city of Milwaukee. It is obvious, however, that a car passing north on the west track from the south abutment to the bridge (as was the car in question) would be much more liable to leave the track than one going in the opposite direction on the same track. This fact would render it the duty of the servants of the defendant in charge of the car to exercise more caution to keep the cars on the track than it would be required were it moving in the opposite direction. Manifestly the most effectual precaution that could be used

to keep the car on the track, or at least to prevent injury to passengers if it left the track, would be to drive slowly from the abutment of the bridge. The testimony in the case, although conflicting, tends to show that this car was driven rapidly at that point. Whether moving the car at such a rate of speed was or was not negligence is peculiarly a question of fact for the jury. The finding in that behalf is supported by the evidence. We conclude, therefore, that there was no error in submitting the question of defendant's negligence to the jury, and the verdict on that question cannot be disturbed.

The testimony of the plaintiff and some of her witnesses tends to show that at the time of the trial she had not recovered from the effect of the injuries; that her limb was not then in a normal condition; and that the effect of such injuries would or might be permanent. She testified that five physicians had examined her limb, among whom was Dr. Hare. During the trial counsel for defendant made the following request, and the following proceedings were thereupon had: "*Defendant's Counsel*: We ask of the court to direct the plaintiff, who is now present, to submit her limb for examination in a private room attached to the court-room, privately, to Drs. Senn and Hare, who are now present, and that if she wish she can be accompanied by any of her own female friends who are present, or any other physician whom she chooses. *Court*: I do not see anything improper in the request, but I do not think I have any authority to compel a suitor to submit, in a case of this kind, to any examination against his or her will; I therefore refuse the application. (Defendant excepts.) Plaintiff's counsel says: 'The plaintiff herself declines to have the examination in the absence of her physician, who, as her attorney is informed and believes, has left the city since he has been on the witness stand.'"

It will be seen that the court denied this request on the sole ground that he had no authority to compel the plaintiff to an examination against her will. On principle and authority we are satisfied that this was error. The then condition of the injured limb had a most important bearing upon the question as to whether the plaintiff's injuries were permanent; and an examination at that time, the results of which would have been put in evidence before the jury, would in all probability have greatly aided them in determining the extent and consequences of the injury. It would, or might have been, more satisfactory and conclusive evidence on that subject than the statements of the plaintiff, or the opinions of the medical witnesses. The application for her examination contained in it every reasonable safeguard against offending the modesty or delicacy of the plaintiff, and although she might shrink from the examination, yet the ends of justice imperatively demanded that she submit to it. Such examinations are frequently

ordered by courts in cases of divorce for impotency, and in cases of alleged pregnancy, and the authority of the court to order them has never been questioned, so far as we are advised.

In *Walch v. Sayre*, 52 How. Pr. 334, the power of the court in a proper case to order a personal examination is asserted, and it is there said that it rests upon the same principle as does the power to compel the discovery of books, papers and documents, the difference being that in a case like this the principle extends to *things* or *substances* as well. *Schroeder v. Chicago, R. I. & P. Ry. Co.*, 47 Iowa, 375, is to the same effect. The opinion of Beck, J., in that case, and of Jones, J., in *Walch v. Sayre*, *supra*, contain very able and satisfactory discussions of this question. It is said by the learned counsel for the plaintiff that it rests in the sound discretion of the court to order or refuse an examination. Perhaps it does. But that discretion has not been exercised here. The court expressly denied the application because of alleged want of power to grant it. We hold that in a proper case the court has power to order an examination, and that this is a proper case in which to exercise it.

It has already been stated that to the question, "What injury did the plaintiff sustain, if any, by such accident?" the jury answered: "Temporary injury to the right leg, which may prove permanent." This is but little, if anything, more than a finding that the injury may possibly be permanent. A mere possible continuance of disability by reason of an injury is not a proper element of damages. To justify the jury in assessing damages for future or permanent disability, it must appear by the proofs that continued or permanent disability is reasonably certain to result from the injury complained of. It is fair to assume that the jury predicated their assessment of damages in part upon the possibility of permanent injury. This is also error. Other errors were assigned and argued by counsel, but as the above views are decisive of the case it is unnecessary to consider them. The judgment of the county court is reversed, and the cause will be remanded for a new trial.

Submission of Person to Experts.—In a proper case where the interests of justice seem to demand it, a party suing for a personal injury may be ordered by the court to submit his person to the examination of competent experts. *Schroeder v. Chicago, R. I. & P. R. Co.*, 47 Iowa, 375; *Atchison, T. & S. F. R. Co. v. Thue*, and note, 10 Am. & Eng. R. R. Cas. 783; *Walsh v. Sayre*, 52 How. Pr. 334.

But such an examination will not be ordered where there is already sufficient competent evidence on both sides and the evidence of the experts would be cumulative only. *Loyd v. Hannibal & St. Joe R. R. Co.*, 53 Mo. 509; *Sioux City & Pacific R. Co. v. Finlayson*, 20 N. W. Rep. 860.

RAYMOND

v.

BURLINGTON, C. R. & N. RAILWAY Co.

(Advance Case, Iowa, December 8, 1884.)

The answer of a party injured by the negligent starting of a railroad train, made in response to a question by a physician as to how the accident occurred, is a privileged communication. A physician cannot be allowed to disclose a privileged communication made in his presence to his partner.

It is the duty of a carrier of passengers to exercise extraordinary care and caution.

All the circumstances under which a passenger received an injury in alighting from a train being proved, if they show nothing in the conduct of the passenger, either of acts or neglect, to which the injury may be attributed, in whole or in part, the inference of due care may be drawn from the absence of all appearance of fault.

APPEAL from Linn Circuit Court.

Action to recover for injuries alleged to have been sustained by being thrown from the platform of the defendant's car by reason of the sudden and careless starting of the train, while the plaintiff, as a passenger, was in the act of leaving it at a station. There was a trial to a jury, and verdict and judgment were rendered for the plaintiff. The defendant appeals.

S. K. Tracy, for appellant.

Stoneman, Rickel & Eastman, for appellee.

ADAMS, J.—This case is before us upon a rehearing. See 13 Am. & Eng. R. R. Cas. 6. The opinion now filed is not substantially different from the former, except in regard to one instruction, which was held to be erroneous.

The defendant introduced as a witness Dr. J. R. Kinney, who testified that he was surgeon of the defendant, and was called to attend plaintiff; that he asked him some questions in regard to his injury; that he wanted information to enable him to judge if the company was responsible; that it was absolutely necessary for him to enable him to obtain a diagnosis, and that all surgeons do that. He also testified that the injury would be more severe if the cars were in motion. The defendant also introduced Dr. H. Ristine, who testified that he was a physician, and was called to assist Dr. Kinney in treating the plaintiff; that he asked the plaintiff how he got hurt, and heard him state how the accident happened, in the presence of Dr. Kinney and Dr. J. M. Ristine. The defendant then asked the witness the following question: "Now I will ask you to state what the plaintiff said, if anything, as to

how the accident occurred, and how he got injured?" The plaintiff objected to the question as calling for a professional communication necessary and proper to enable the doctor to exercise his professional functions. In answer to a question by the court the witness stated that he was called as consulting physician, and asked this question for the purpose of ascertaining the facts in order to properly treat him. The court thereupon sustained the objection. The defendant thereupon offered to show by this witness that the plaintiff, in response to questions asked, stated that he stepped off the car while it was in motion, and thus fell and received the injury sued for. The court excluded the evidence, and the defendant assigns the action of the court as error.

The Code, Sec. 3643, provides: "No practicing attorney, counselor, physician, surgeon, minister of the gospel, or priest of any denomination shall be allowed, in giving testimony, to disclose any confidential communication properly intrusted to him in his professional capacity, and necessary and proper to enable him to discharge the functions of his office according to the usual course of practice or discipline." Dr. Ristine testified that the communication was made by the plaintiff in response to a question asked for the purpose of ascertaining the facts in order to properly treat him; and Dr. Kinney testified that the injury would be more severe if the cars were in motion. In view of this testimony, we think the communication comes within the protection of the statute.

The defendant also introduced Dr. J. M. Ristine, who testified that he was a partner of Dr. H. Ristine, and heard the statements made to him. The defendant offered to prove by this witness the same communication sought to be proved by Dr. H. Ristine, and claimed the right to do so upon the ground that the communication was not made to this witness, but merely in his hearing. Manifestly, it would violate the spirit of the statute to permit a physician to disclose a communication made in his presence to his partner.

The defendant complains of an instruction given by the court to the effect that it was the duty of the defendant, as a common carrier of passengers, to exercise extraordinary care and caution; but it appears to us that the rule of the instruction is well settled. *Sales v. Western Stage Co.*, 4 Iowa, 547.

The court gave an instruction in these words: "You have been instructed that the burden is upon the plaintiff to prove that he was free from contributory negligence; and the court further instructs you that such requirement of the law is sufficiently complied with when the plaintiff, having given in the testimony in his behalf, showing his act in relation to the transaction causing the injury to him, and such testimony fails to show contributory negligence on his part; but you are further charged that if you find,

from a preponderance of the whole testimony in the case, that on the part of the defendant, as well as on the part of the plaintiff, that the plaintiff was guilty of contributory negligence, the plaintiff cannot recover, although the testimony of the plaintiff alone may fail to show such contributory negligence on his part." Upon the former hearing this instruction was held to be erroneous. Upon a re-examination of the case we have come to the conclusion that the instruction, as applied to the particular facts of the case, can be approved.

The instruction holds, in substance, that if the plaintiff showed what his *acts* were, and if they did not appear to be negligent, the jury would be justified in finding that he was free from negligence. It is manifest that the rule of the instruction, as an abstract one, could not be approved. It may happen, and sometimes does, that the person injured is guilty of negligence in what he omits to do. The inquiry of the jury should not, as a rule, be limited to the injured person's acts, but should be as broad as the circumstances of the case. The writer of this opinion thought, upon the former hearing, that the rule enunciated in the instruction was too narrow. But the facts of the case are such that it seems certain that the plaintiff was not guilty of contributory negligence unless it was by reason of something which he did. The writer, therefore, is of the opinion now, and such is the opinion of the entire court, that the instruction is not liable to the objection mentioned. But it is said that there is another objection to which it is liable, and that is that it does not maintain the established rule in regard to burden of proof. This view seemed plausible at first. It was adopted by Chief Justice Day, who wrote the former opinion, and was acquiesced in by a majority. But we are now agreed that it is not sound. The part of the instruction which the defendant objects to in this respect is that which holds, in substance, that if the plaintiff showed his acts in the transactions, and they *failed* to show contributory negligence, the burden upon this point would be shifted. As to this we may say, as we have already said of the instruction in other respects, that the rule could not be approved as an abstract one. The character of acts, as showing negligence or otherwise, often depends upon a great number of circumstances. We can conceive of a case where the plaintiff might prove the injured person's acts, and the jury, by reason of a want of knowledge of the circumstances, be left entirely in the dark as to whether they showed contributory negligence or freedom from it. In such case it could not be said that the rule of the instruction would be correct. But the case before us is not one of that kind. The character of the plaintiff's acts, so far as it depended upon circumstances, was clearly shown. The only question then, is, was it sufficient to shift the burden of proof for the plaintiff to show his acts, if they failed to show contributory negligence? We think

it was. Where there is no question of negligence by reason of an omission, and no question in regard to the surrounding circumstances, and the only question is as to whether the injured person, in view of the conceded circumstances, was negligent in what he did, we are unable to see how the plaintiff could do more than prove what he did. In proving what he did, he would prove what care he exercised, and acts fully disclosed and understood must always be deemed sufficiently careful which evince no negligence.

The true rule, and one of general application, appears to us to be that stated in *Mayo v. Boston & M. Ry. Co.*, 104 Mass. 140. It is stated in these words: "All the circumstances under which the injury was received being proved, if they show nothing in the conduct of the plaintiff, either of acts or neglect, to which the injury may be attributed in whole or in part, the inference of due care may be drawn from the absence of all appearance of fault."

The instruction given by the court below was not, we think, in view of the particular facts of the case, inconsistent with the rule above expressed, and the judgment must be affirmed.

General Reference.—For a full collection of the authorities in point as to the principal case, see note to *Burlington, C. R. & N. R. Co.*, 13 Am. & Eng. R. R. Cas. 6.

BALTIMORE CITY PASSENGER RAILWAY CO.

v.

KEMP AND WIFE.

(61 *Maryland Reports*, 74.)

In an action by husband and wife against a railroad company to recover for personal injuries sustained by the wife through the alleged negligence of the defendant, the jury were instructed that in estimating the damages they were to consider the health and condition of the female plaintiff before the injury, as compared with her condition at the time of the trial, in consequence of the injury; "and whether the injury in its nature was permanent, and how far it was calculated to disable her from engaging in those household pursuits and employments for which, in the absence of such injury, she would be qualified; and also the physical and mental suffering to which she was subjected by reason of the injury; and to allow such damages as in the opinion of the jury would be a fair and just compensation for the injury *which she sustained*." Held, that the instruction, in terms, confined the damages to be awarded to compensation for the personal injury sustained by the wife; and there was nothing embraced in it for which the husband could have sued alone.

The female plaintiff having testified that shortly after the injury complained of a cancer was developed at the place on her person where she was injured, and medical testimony having been offered on both sides of the question, whether the cancer was the result of the injury, it was held:

1st. That it was for the jury to determine as a matter of fact, whether the cancer did result from the injury received. And in determining this question they were required to consider all the circumstances and coincidences of the case in connection with the testimony of the professional witnesses.

2d. That if the jury believed from all the evidence before them that the cancer was the natural and proximate consequence of the blow received by the negligent act of the defendant, it would properly form an element to be considered in awarding damages for the pain and injury suffered by the female plaintiff.

3d. That the fact that she may have had a tendency or predisposition to cancer, could afford no proper ground of objection to her claim.

Where a passenger on a railroad train is injured through the fault of the company, he may elect to sue in tort and may recover according to the principles obtaining in such an action.

APPEAL from the Circuit Court for Howard county.

Bernard Carter and *A. W. Machen*, for the appellant.

John S. Tyson and *Henry E. Wootton*, for the appellees.

ALVEY, C. J.—This is an action brought by husband and wife to recover for personal injuries suffered by the wife, caused, as it is alleged, by the negligent wrong of the defendants.

The trial below resulted in a verdict and judgment for the plaintiffs; and the defendants have appealed for alleged errors in granting a prayer on the part of the plaintiffs, and refusing a prayer on the part of the defendants.

It is objected by the defendants that the instruction granted at the instance of the plaintiffs includes and authorized the jury to find for a cause of action that should have been sued for by the husband alone, without the joinder of the wife. We do not so read the instruction. It simply directed the jury that, in estimating the damages, they were to consider the health and condition of the female plaintiff before the injury complained of, as compared with her condition at the time of the trial, *in consequence* of the injury; "and whether the injury in its nature was permanent, and how far it was calculated to disable her from engaging in those household pursuits and employments, for which, in the absence of such injury she would be qualified; and also the physical and mental suffering to which she was subjected by reason of the injury; and to allow such damages as in the opinion of the jury would be a fair and just compensation for the injury *which she sustained*."

Now, according to the common law upon this subject, it is perfectly well settled that in an action brought for personal injuries suffered by the wife, the husband and wife must join, and the declaration must conclude to their damage. But in such action care should be taken that there be not included any cause of action for which the husband should sue alone; as, for instance, for loss of services, expenses incurred and the like. Dengate

and Wife v. Gardiner, 4 M. & W. 6; Stoop and Wife v. Swarts, 12 Sergt. & R. 76; 1 Chitt. Pl. 82, 83. In the instruction before us reference is made to the disability of the wife to perform household duties, but that was only by way of contrasting her former with her present condition of health. The jury were not directed or authorized, in estimating the damages, to allow for the loss of services of the wife while suffering under the disability occasioned by the injury. The instruction, in terms, confined the damages to be awarded to compensation for the personal injury sustained by the wife; and there was nothing embraced for which the husband could have sued alone. The action was brought before the passage of the Act of 1882, Chap. 265, which provides "that any married woman may sue in any court of law or equity in this State, upon any cause of action, in her own name, and without the necessity of a *prochein ami*, as if she were *feme-sole*; and therefore it is unnecessary to consider whether that act extends to a case like the present.

The second prayer offered by the defendants, and which was refused by the court, asked that the jury be instructed that there was *no legally sufficient evidence* that the cancer, testified to by the witnesses, *was caused* by the negligence of the defendants, and therefore they should not take the cancer into consideration in estimating any damages that they might award to the female plaintiff. And upon this prayer for instruction, the defendants contend: (1) That there was no evidence, *legally sufficient* to be considered by the jury, that the cancer of which Mrs. Kemp suffered was the natural result or consequence of the negligence complained of; and (2) that if there was in fact, any casual connection between the immediate injury received by Mrs. Kemp and the subsequent development of the cancer, the latter, to be treated as a legal effect, was too obscure and too remote from the alleged cause to form an element of damage for the original wrongful act.

We shall not recite in detail all the evidence upon the subject. Suffice it to state, that the evidence shows clearly and without contradiction that Mrs. Kemp was at the time of the accident, and for many years prior thereto, apparently in good health and condition. The accident occurred about the middle of May, 1880, and a very short time thereafter the cancer commenced its development on the injured part of her person. In her testimony, after describing the manner in which the accident occurred, and how she was thrown against the railing on the platform of the car as she was about getting off, and the hurting of her right arm and left breast, she states that the right arm was bruised and discolored; and "where the breast was struck it was sore, and remained so from that time out. Prior to that time she had no pain or soreness; and two or three weeks afterward a small lump ap-

peared in the left breast," which, upon being shown to her physician, was pronounced to be a cancer. Dr. Smith first operated for its removal on the 8th of November, 1880, when it was about the size of an orange, and he operated again about the 12th of January, 1881, when the entire breast was removed, but without success in extirpating the roots of the disease. The cancer still remains and is pronounced to be incurable. The two daughters of Mrs. Kemp, in their testimony, fully corroborate the statement of their mother in regard to her previous good health and apparent freedom from disease, and the subsequent appearance and growth of the cancer. And the professional witnesses, while they all testify that it is impossible to know and be certain as to the origin of cancer in any given case, yet they all agree in saying that the blow, such as that described by Mrs. Kemp, was sufficient and may have been the cause of the development of the cancer in her case. In the opinion of two of the physicians, Dr. Latimer and Dr. Turner, the blow on the breast, as described by Mrs. Kemp, was not only sufficient cause for the production of the cancer, but that they would attribute the cancer to that cause. And from the coincidence of the case we must say that their opinion does not appear to be unreasonable.

Now, with this evidence in the case, unless the court could have been required to hold, as matter of law, that the production of cancer was too uncertain and too remote a consequence of the alleged injury to be allowed to be considered in estimating the damages, upon what principle could the court properly withhold the matter from the jury upon the prayer offered by the defendants? It was for the jury to determine as matter of fact whether the cancer did result from the injury received. And in determining this question they were required to consider all the circumstances and coincidences of the case in connection with the testimony given by the professional witnesses. If, therefore, the subject was proper to be considered by the jury at all, we are clearly of opinion that there was evidence sufficient to be considered by them.

Now, the question is, whether the production of cancer, as the result of an injury received by the negligence of the defendants, under the circumstances of this case, be too remote a consequence from such negligence to form an element of damage to the plaintiff. If it be not, then, clearly, the court below committed no error in refusing the second prayer of the defendants.

It is not simply because the relation of cause and effect may be somewhat involved in obscurity, and therefore difficult to trace, that the principle obtains that only the natural and proximate results of a wrongful act are to be regarded. It is only where there may be a more direct and immediate sufficient cause of the effect complained of, that the more remote cause will not be charged with the effect. If a given result can be directly

traced to a particular cause, as the natural and proximate effect, why should not such effect be regarded by the law, even though such cause may not always, and under all condition of things, produce like results? It is the common observation of all, that the effects of personal physical injuries depend much upon the peculiar conditions and tendencies of the persons injured; and what may produce but slight and comparatively uninjurious consequences in one case, may produce consequences of the most serious and distressing character in another. And this being so, a wrong-doer is not permitted to relieve himself from responsibility for the consequences of his act, by showing that the injury would have been of less severity if it had been inflicted upon anyone else of a large majority of the human family. Hence the general rule is that, in actions of tort like the present, the wrong-doer is liable for all the direct injury resulting from his wrongful act, and that, too, although the extent or special nature of the resulting injury could not, with certainty, have been foreseen or contemplated as the probable result of the act done. 3 Suth. on Dam. 714, 715, and the cases there cited. The general rule is stated by Addison in his work on Torts (3d ed.), page 5, with as much clearness and precision as will be found in any other text writer, and he states the rule to be "that whoever does an illegal act is answerable for all the consequences that ensue in the ordinary and natural course of events, though those consequences be immediately and directly brought about by the intervening agency of others, providing the intervening agents were *set in motion* by the primary wrong-doer, or provided their acts causing the damage were the necessary or legal and natural consequence of the original wrongful act." If, therefore, the jury believed, from all the evidence before them, that the cancer in the breast of Mrs. Kemp was the natural and proximate consequence of the blow received on her breast by the negligent act of the defendants, it would properly form an element to be considered in awarding damages for the pain and injury suffered by her.

If by the blow received a severe contusion had been produced, resulting in an ordinary tumor or open ulcer, we suppose no question would have been raised as to the right of the plaintiff to show such results of the injury received, as indicating the extent of the injury and the degree of suffering endured. Why should a different rule be applied to this case? That the female plaintiff may have had a tendency or predisposition to cancer can afford no proper ground of objection. She, in common with all other people of the community, had a right to travel or be carried in the cars of the defendants, and she had a right to enjoy that privilege without incurring the peril of receiving a wrongful injury that might result in inflaming and developing the dormant germs of a fatal disease. It is not for the defendants to say that because

they did not, or could not, in fact, anticipate such a result of their negligent act, they must therefore be exonerated from liability for such consequences as ensued. They must be taken to know and to contemplate all the natural and proximate consequences, not only that certainly would, but that probably might flow from their wrongful act. The defendants must be supposed to know that it was the right of all classes and conditions of people, whether diseased or otherwise, to be carried in their cars, and it must also be supposed that they knew that a personal injury inflicted upon any one with predisposition or tendency to cancer might and probably would develop the disease. See case of *Stewart v. City of Ripon*, 38 Wis. 584.

The defendants have cited and relied upon the case of *Hobbs and Wife v. The London & Southwestern R. Co., L. R., 10 Q. B. 111*, as maintaining a doctrine different from that just stated by us. But in several respects that case is quite different from this. In the first place, that was an action upon contract, seeking a recovery for a breach thereof. There, a passenger, who had been set down with his wife at a wrong station, sought to recover from the railway company damages for a cold which his wife had taken in consequence of the exposure in having to walk home in the rain. And it was held that the loss so occasioned was not so connected with the breach of contract as that the carrier breaking the contract would be liable. As said by the court, the catching cold by the plaintiff's wife was not the immediate and necessary effect of the breach of contract, or was not such an effect as could fairly be said to have been in the contemplation of the parties. But we suppose, with Mr. Mayne, in his work on Damages, p. 73 (Wood's ed.), that that case would have been differently decided, if, instead of putting the plaintiff down safely at the wrong place, the company had by their negligence caused any personal injury to him. Without, therefore, intimating that we should accept the decision as an authority in any case, we think it has no direct application to the case before us.

Concurring with the court below in its rulings excepted to, we must affirm the judgment.

Judgment affirmed.

DISSENTING OPINION.

STONE, J.—I am unable to agree with the majority of the court upon the principal question involved in this case. I think, as a *matter of law*, the plaintiff was not entitled to recover damages for the cancer which she claims was the result of the injury she received on the road of the defendant. In the view that I take of the matter, it makes no difference whether the cancer was the result of the accident or not, but I assume that it was, in fact, produced by the injury the plaintiff received on the defendant's road.

This was an action brought against a common carrier for *negligence and carelessness*, whereby the passenger was injured. In my opinion, all such actions are founded on contract, and the damages recoverable are for a breach of the contract, and for that only.

This is not an action for an *intentional or wanton injury*. Such cases stand upon an entirely different footing from the one before us, and, in such a case, where the injury is the result of an intentional or wanton act, the rule of damages is and ought to be entirely different.

In the case before the court, and in all cases where a railroad or other transportation company undertakes to carry a passenger for hire from point to point, they undertake to transport him safely, or at least to use *all possible care* to do so. If by the negligence of their employes he is injured, it is a breach of the contract they made with him, and that only. The measure of the damages is the injury he receives from the breach of the contract to use all possible care to transport him safely. What is the correct measure of damages is still in many cases a matter of doubt.

It is now well settled, both in England and in this State, that the liability of a common carrier, who undertakes to carry goods, is the value of the goods at the place of delivery and nothing more. This is placed upon the ground that it is a contract made by the carrier that for a certain consideration he will *carry safely* the goods to the point of their destination.

But damages for injuries to the person of a passenger carried, by negligence of the carrier, are not so readily ascertained or measured. Still I think the principle is the same. I think it must be conceded that cancer is a distinct and well-known disease, not necessarily or probably connected with or resulting from railway accidents. It was known and dreaded probably centuries before the running of the first railway train.

It is not the natural and probable consequence of a railway accident of any sort. If it did result from the injury the plaintiff received in this case such a result was highly improbable, exceptional, and one that could not possibly have been foreseen or contemplated by the company when they undertook to carry the passenger safely, and could have formed no part of the contract between the company and the passenger.

Since Baxendale's case it has been generally conceded, both in England and in this State, that the market value of the goods at the place of delivery, is the measure of the damages for their loss or injury. It is true that the owner of the goods may sustain a much greater loss than the market value of the goods. The failure to get them may disarrange and cause serious loss to his business. But such losses, which *may possibly* accrue, form no part of the contract of the carrier. They are too remote and con-

tingent, and form no part of his ordinary contract. He does not undertake to guard against any such *merely possible* contingency. He does not charge for any such risk.

So when the transportation company undertakes to carry a person from place to place, it does guarantee against the natural, probable and ordinary consequences of any negligence or carelessness on its part which causes injury to the passenger. But it does not insure against *every possible* injury which can be traced back and had its beginning in the accident. It must be something that the company can foresee, and thus guard against, before it can be held responsible. It cannot examine into the health and condition of the passenger, but must take all, the delicate and sickly, as well as the strong and robust, the diseased as well as the healthy. It is very possible that mere fright at the occurrence of a slight railroad collision might cause death to a person in the last stage of heart disease, although he might be physically untouched. In such case would the railroad be chargeable with his death?

In the case of *Hobbs v. London & South Western Railway Company*, 10th Law Reports, Queen's Bench, the facts were these:

The plaintiffs bought tickets from Wimbledon to Hampton Court, but it so happened that the train did not go to Hampton Court, but went to Esher station, which increased the distance the plaintiffs had to go from the railway station to their home, some two or three miles. They were unable to get a conveyance from Esher station to their home, and had to walk. The night being rainy the wife contracted a cold and was laid up for some time, and medical expenses were incurred. At the trial below the jury found a verdict for eight pounds on account of the inconvenience of the plaintiffs being obliged to walk home, and also twenty pounds for the wife's illness.

In the court of Queen's Bench the case was tried before Cockburn, C. J., and Blackburn, Mellor and Archibald, justices, who unanimously decided that the railway company were not responsible for the illness of the wife.

In delivering his opinion on the question of the liability of the railway company for the illness of the wife, Chief Justice Cockburn said: "That to entitle a person to damages by reason of a breach of contract, the injury for which compensation is asked should be one that may be fairly taken to have been contemplated by the parties as the possible result of the breach of the contract. Therefore you must have something immediately flowing out of the breach of the contract complained of, something immediately connected with it, and not merely connected with it through a series of causes intervening between the immediate consequence of the breach of contract and the damage or injury complained of. Here, I think, it cannot be said the catching cold by the plaintiff's wife is the immediate and necessary effect of the breach of

contract, or was one which could be fairly said to have been in the contemplation of the parties." And further on he says, speaking of the cold taken by the wife: "It is an effect of the breach of contract in a certain sense, but removed one stage; it is not the primary but the secondary consequence of it." And again, "it is not the necessary consequence, it is not even the probable consequence of a person being put down at an improper place, and having to walk home, that he should sustain either personal injury or catch a cold. That cannot be said to be within the contemplation of the parties so as to entitle the plaintiff to recover."

Mellor, in his opinion, says that the true rule of damage is "such as arises naturally and directly from the breach of contract, or such as both parties might reasonably have expected to result from a breach of the contract."

In *Mayne on Damages* (second edition), page 27, the general rule is thus laid down: "The first, and in fact the only inquiry, in all these cases is, whether the damage complained of is the natural and reasonable result of the defendant's act; it will assume this character, if it can be shown to be such a consequence, as in the ordinary course of things would flow from the act, or, in cases of contract if it appears to have been contemplated by both parties; when neither of these elements exist the damage is said to be too remote."

In *Indianapolis, Bloom. & W. R. R. Co. v. Birney*, 71 Ill. 391, the court says: "Damages produced by other agencies than those causing the injury, or even by agencies remotely connected with those causing the injury, cannot be awarded as proximate or proper compensation, but only where the injury flows from the wrongful act, as its natural concomitant or as the direct result thereof. Where speculation or conjecture has to be resorted to for the purpose of determining whether the injury results from the wrongful act, or from some other, then the rule of law excludes the allowance of damages for such injury."

In the case of *Sheffer v. Virginia Midland R. R. Co.*, 105, U. S. 249, s. o. 8 Am. & Eng. R. R. Cas. 59, the facts were these: A passenger was injured by a collision on the railroad, and his injury was so serious that it resulted in his insanity; while insane he committed suicide, and suit was brought against the railroad for his death. All the facts were spread upon the record, and the case came up on demurrer. The court refused to hold the company responsible in damages for the death of the passenger, and in their opinion say:

"It must appear that the injury was the natural and probable consequence of the negligence or wrongful act. The suicide of Sheffer was not a result naturally and reasonably to be expected from the injury received on the train. It was not the natural and probable consequence, and could not have been foreseen in the

light of the circumstances attending the negligence of the officers in charge of the train. His *insanity* as a cause of his final destruction, was as little the natural or probable result of the negligence of the railroad officials as his suicide, and each of these are casual or unexpected causes, intervening between the act which injured him and his death."

Many more cases might be cited, to the same effect. It will appear from the above cases, that the court of Queen's Bench in England, the Supreme Court of the United States, and the highest court of one of the States, are in substantial accord upon the subject of the proper rule for the ascertainment of damages. A careful examination of these cases will show that they all proceed upon the theory: first, that the injury to the passenger caused by the *negligence* of the railway company or its employes is, in reality, a breach of contract made by the company to transport the passenger safely; secondly, that the injury must be the natural and probable consequence of the accident, or negligence of the company or its employes, and not of casual or unexpected causes intervening between.

In this case, the facts are these, according to the theory of the plaintiff: The passenger received a bruise by the negligence of the company's employe in starting a car while she was getting off. Some time after, cancer developed on the spot where she received the bruise, and the bruise was the cause of the cancer; but that cancer is not the natural or ordinary consequence of a bruise, but *may be*.

This is the evidence as strongly as it can be stated in behalf of the plaintiff, and does not bring the case within the rule laid down either by the Queen's Bench or the supreme court.

The death of the passenger may, and probably will, be caused by the cancer, and thus may be traced back to the accident; and it seems to me that the railroad may as properly be held liable for her death as for the disease that will likely cause her death.

Whether such a disease as cancer did result from the bruise, must, in the very nature of things, be a mere conjecture. Admitting for the sake of the argument, that it did so result in this particular case, it only can mean that the jury *conjectured rightly*. Into such a wide field of conjecture, I cannot think that a jury should be permitted to wander, and therefore am of opinion that the judgment should be reversed.

The following opinion was afterwards delivered upon motion for reargument.

(61 *Maryland*, 619.)

ALVEY, C. J.—There has been a motion made in this case for reargument, based largely upon authorities that were not brought

to the attention of the court on the former hearing; and hence we depart from the general practice of disposing of such motions without the formal assignment of reasons for the action of the court thereon.

Upon the question whether the jury should have been allowed to infer, upon the evidence before them, that cancer was the result of the injury received by the plaintiff, the defendant cites and relies upon the case of *Jewell v. Grand Trunk Railway Co.*, 55 N. H. 84, a case not referred to on the former argument. But the facts of that case are so entirely different from those of the case before us that the analogy between the two cases is but slight. In the first place, the party whose negligence caused the injury in that case was not, according to the decision of the court, the servant or employé of the defendant, and therefore the defendant was not liable for his acts. In the second place, there was a considerable length of time intervening between the time of the accident and the death of the party, the latter in the meantime being engaged in hard work and subjected to much exposure, and all the circumstances of the case rendered it exceedingly doubtful whether there could be any connection between the injury received by a blow on the *right* shoulder and a cancer that was found to exist, by *post-mortem* examination, in the *left* lung of the party, a year and a half after the injury received. And the physicians all testified that, in their opinion, neither the last sickness of the party nor the cancer was in any way attributable to the injury previously received. The court, moreover, considered and determined the case upon the *weight* of evidence, as upon motion for a new trial, and not as upon a demurrer to the legal sufficiency of the evidence to be submitted to the jury, as in the case before us. The other cases cited upon this question have only a remote or indirect bearing, and we do not perceive that they are at all in conflict with the opinion that has been delivered in this case.

Since the opinion in this case was delivered, 50th Michigan has been published, and that volume contains the case of *Beauchamp v. Saginaw Mining Co.*, at p. 163. In that case, a boy, while passing on a highway, was injured by being struck on the side of his head by a stone from a blast fired by the mining company, and having died some five or six months thereafter, an action was brought to recover damages for his death, caused, as it was alleged, by the negligence of the defendant. Among other defences, it was alleged, and evidence was given to show, that death was not caused by the injury but by specific or typical pneumonia; and the case was sought to be taken from the jury upon the ground that pneumonia and not the injury received from the stone was the direct and proximate cause of the death. The physician who attended the boy in his sickness testified that he

died of pneumonia, though he had been very seriously injured, and was paralyzed on one side, and the chances of recovery were against him. The doctor said in his testimony: "I am unprepared to say what caused pneumonia in this case. In my opinion it was a specific or typical pneumonia; the relation between it and the injured head was not close." It was contended, however, for the plaintiff that, owing to the broken and shattered condition of the boy's system, caused by the injury received, and his increased susceptibility to cold, pneumonia was superinduced and developed as a natural result of the injury; and that question was submitted to the jury upon the evidence, and they found for the plaintiff. The case was taken to the Supreme Court of Michigan, and the error assigned was the submission of the question to and allowing the jury to conclude as to whether pneumonia did, in fact, result from and was a consequence of the injury received by the boy. The supreme court affirmed the ruling of the court below, and held that "if the injury received and sickness following concurred in and contributed to the attack of pneumonia, the defendant must be held responsible therefor." And so in this case: If the injury received by Mrs. Kemp by the negligence of the defendant superinduced and contributed to the production or development of cancer the defendant is responsible therefor; and the cancer is not to be treated as an independent cause of injury or suffering any more than pneumonia, resulting from an injury that rendered the system susceptible of and liable to the attack, as a natural consequence of such injury, is to be regarded as an independent cause of death. In both cases the original injury was the prime cause that opened the way to and set other causes in motion which led to the fatal results. And the wrong-doer cannot be allowed to apportion the measure of his responsibility to the initial cause. Whether the direct casual connections exist is a question in all cases for the jury upon the facts in proof.

There is another ground upon which re-argument of the case is asked, and that is with respect to the nature of the action and for what nature and extent of injury damages may be allowed to be recovered therein. The defendant insists that while the form of action is as for a tort, yet the real ground of the right to recover in this case is simply for breach of the contract to carry safely, and to put the party down safely. And that being so, according to the contention, it is insisted that to entitle the plaintiff to damages by reason of a breach of the contract, the injury for which compensation is asked should be shown to be such that it may fairly be taken to have been contemplated by the parties as the possible result of the breach of the contract; and that, in this case, no such consequence as the production of cancer in the plaintiff could have been anticipated as the probable result of the negligent act of the defendant. But to this proposition we cannot agree; and, in our opinion, it is not supported by authority.

A common carrier of passengers who accepts a party to be carried owes to that party a duty to be careful, irrespective of contract; and the gravamen of an action like the present is the negligence of the defendant. The right to maintain the action does not depend upon contract, but the action is founded upon the common law duty to carry safely; and the negligent violation of that duty to the damage of the plaintiff is a tort or wrong which gives rise to the right of action. *Bretherton v. Wood*, 3 B. & Bing. in Ex. Ch. 54. If this were not so, the passenger would occupy a more unfavorable position in reference to the extent of his right to recover for injuries than a stranger; for the latter, for any negligent injury or wrong committed, can only sue as for a tort, and the measure of the recovery is not only for the actual suffering endured, but for all aggravation that may attend the commission of the wrong; whereas, in the case of a passenger, if the contention of the defendant be supported for the same character of injury, the right of recovery would be more restricted. The principle of these actions against common carriers of passengers is well illustrated by the case of a servant whose fare has been paid by the master; or the case of a child for whom no fare is charged. In both of the cases mentioned, though there is no contract as between the carrier and the servant, or as between the carrier and the child, yet both servant and the child are passengers, and for any personal injuries suffered by them, through the negligence of the carrier, it is clear they could sue and recover; but they could only sue as for a tort. The authorities would seem to be clear upon the subject, and leave no room for doubt or question.

In the case of *Marshall v. York, Newcastle & Berwick R. Co.*, 11 C. B. 655, in discussing the ground of action against a common carrier, *Jervis, C. J.*, said: "But upon what principle does the action lie at the suit of the servant for his personal suffering? Not by reason of any contract between him and the company, but by reason of a duty implied by law to carry him safely." And in the same case *Mr. Justice Williams* said: "The case was, I think, put upon the right footing by *Mr. Hill*, when he said that the question turned upon the inquiry whether it was necessary to show a contract between the plaintiff and the railroad company. His proposition was, that this declaration could only be sustained by proof of a contract to carry the plaintiff and his luggage for hire and reward, to be paid by the plaintiff, and that the traverse of that part of the declaration involves a traverse of the payment by the plaintiff. I am of opinion that there is no foundation for that proposition. It seems to me that the whole current of authorities, beginning with *Govett v. Radnidge*, 3 East, 62, and ending with *Pozzi v. Shipton*, 8 Ad. & El. 963, establishes that an action of this sort is, in substance, not an action of contract, but an

action of tort against the company as carrier." And in the subsequent case of *Austin v. Great West. R. Co., L. R., 2 Q. B. 442*, Mr. Justice Blackburn, now Lord Blackburn, in delivering his judgment in that case said: "I think that what was said in the case of *Marshall v. York, Newcastle & Berwick R. Co., 11 C. B. 655*, was quite correct. It was there laid down that the right which a passenger by railway has to be carried safely, does not depend on his having made a contract, but that the fact of his being a passenger casts a duty on the company to carry him safely." And to the same effect, and with full approval of the authorities just cited, are the cases of *Foulkes v. Met. Dis. R. Co., 4 C. P. Div. 267*, and the same case on appeal, *5 C. P. Div. 157*, and *Fleming v. Manchester, &c., Railway Co., 4 Q. B. Div. 81*. The case of *Bretherton v. Wood, 3 Bro. & Bingham, 54*, is a direct authority upon the question.

A passenger may, without doubt, declare for a breach of contract where there is one; but it is at his election to proceed as for a tort where there has been personal injury suffered by the negligence or wrongful act of the carrier or the agents of the company; and in such action the plaintiff is entitled to recover according to the principles pertaining to that class of actions, as distinguished from actions on contract. And this is the settled doctrine and practice in this State. *Stockton v. Frey, 4 Gill, 406*; *Baltimore & Ohio R. Co. v. Blocher, 27 Md. 277, 287*; *Baltimore & Yorktown Turnpike Co. v. Boone, 45 Md. 344*; *Stokes v. Saltonstall, 13 Pet. 181*.

The motion for re-argument must be overruled.

When Disease is Considered Proximate and When Remote Result of Company's Negligence.—A railroad company is liable for all injuries to passengers and others which are the direct consequences of its wrongful or negligent acts. It becomes, however, in many cases a very difficult question to determine what is a direct and what a remote consequence of the company's wrongful act.

Where a party is wrongfully detained in an exposed or unhealthy place, in consequence of which he contracts disease, the company is undoubtedly liable. *Heirn v. McCaughan et ux, 32 Miss. 17*; *Williams v. Vanderbilt, 28 N. Y. 217*; *Terre Haute & Ind. R. R. Co. v. Buck, supra*. When he is expelled from the train at a point where he is obliged to walk, and, in consequence of so doing is made sick, he may recover damages for such sickness. *Drake v. Kiely, 93 Pa. St. 492*; *Cincinnati, H. & S. R. Co. v. Eaton, 94 Ind. 474*; s. c. *infra*.

But see, *Hobbs v. Midland R. Co., L. R. 10 Q. B. 111*; *Indianapolis, B. & W. R. Co. v. Birney, 71 Ill. 891*; *Cleveland, etc., R. R. Co. v. Newell, 8 Am. & Eng. R. R. Cas. 374*, in which it is held that a party cannot, by electing to walk a long distance, in such case entitle himself to damages for sickness caused thereby.

Where by an accident a passenger was rendered paralyzed by fright, and while in that condition was injured through incapacity to help herself, the company was held responsible for the injury. *Smith v. British & N. A. R. M. P. S. Co., 86 N. Y. 408*.

Where a party is injured in a railway accident, the injury brings on insanity and the insane patient commits suicide, the death is too remote a

consequence of the original injury to constitute the basis for an action against the railroad company. *Scheffer v. Washington City & M. Gt. S. R. Co.*, 8 Am. & Eng. R. R. Cas. 59.

Predisposition to Disease.—The fact that a party's condition or physical constitution is such as to make the injury done him particularly severe, or to aggravate its effects, does not relieve the person inflicting the injury from liability for the full consequences of his act. *Commonwealth v. Warner*, 4 McLean, 464; *State v. Morea*, 2 Ala. 275; *Commonwealth v. Fox*, 7 Gray. 585; *McAllister v. State*, 17 Ala. 434; *Commonwealth v. Green*, 1 Ashm. 289; *Kitteringham v. Sioux City & Pacific R. Co.*, 62 Iowa, 285; *Heirn v. McCaughan*, 82 Miss. 17; *Mobile & Ohio R. R. Co. v. McArthur*, 43 Miss. 180; *Stewart v. City of Ripon*, 38 Wis. 584; and see *Jewell v. Railway*, 55 N. H. 84.

But see, *contra*, *Pullman Palace Car Co. v. Barker*, 4 Col. 344.

Pregnant Women.—Where women advanced in pregnancy are exposed to cold or otherwise injured, the company is liable for all the consequences, including a miscarriage. *Heirn v. McCaughan et ux*, 82 Miss. 17; *Brown et ux v. Chicago, M. & St. P. R. Co.*, 54 Wis. 842; *Oliver v. La Valle*, 86 Wis. 592; *Barbee v. Reese*, 60 Miss. 906.

Passenger may Sue for injury in Tort or Assumpsit.—Originally, the practice seems to have been unusual to sue a common carrier in tort where a passenger was injured while in transit through a breach of the carrier's public duty. *Ansell v. Waterhouse*, 6 M. & S. 885; *Angell on Carriers*, Sec. 422.

Such an action will still lie and is in many cases brought. *Saltonstall v. Stockton*, Taney's, Dec. 11; *Pozzi v. Shipton*, 8 Ad. & Ell. 963; *Baltimore & Ohio R. R. Co. v. Wilson*, 31 Ohio St. 555; *Ames v. Union Ry. Co.*, 17 Mass. 541; *Frink et al. v. Potter*, 17 Ill. 406; *Havens v. Hartford & New Haven R. R. Co.*, 28 Conn. 69; *Hammond v. North Eastern R. Co.*, 6 S. C. 180; *Nevin v. Pullman Palace Car Co.*, 11 Am. & Eng. R. R. Cas. 92.

In those States where the distinction between different forms of action is abolished, the court will look at the nature of the cause of action, and will determine from it whether the suit sounds in tort or contract. *Cregin v. Brooklyn & Crosstown R. R. Co.*, 75 N. Y. 192; *Heirn v. McCaughan*, 82 Miss. 17; *New Orleans, etc., R. R. Co. v. Hurst*, 36 Miss. 660; *Frink v. Potter*, 17 Ill. 406; *School District v. Boston, H. & E. R. R. Co.*, 102 Mass. 552.

Relative Advantages of Suits in Contract or Tort.—Where the action sounds in contract, compensatory damages only can be recovered. When it sounds in tort, vindictive damages can be recovered when the circumstances warrant it. *Hamlin v. Great Northern R. R. Co.*, 1 H. & N. 408; *New Orleans, etc., R. R. Co. v. Hurst*, 36 Miss. 660; *Walsh v. Chicago, etc., R. R. Co.*, 42 Miss. 23.

It seems that there can be no recovery in tort for a failure on the part of a carrier to carry safely on Sunday. The general public duty of a common carrier does not extend to a day *non juridicus*. *Walsh v. Chicago, etc., R. R. Co.*, 42 Wis. 23.

Formal variances between the pleadings and proof are less considered in actions sounding in tort than in contract. *Weed v. Saratoga & Schenectady R. R. Co.*, 19 Wend. 434.

TERRE HAUTE & INDIANAPOLIS RY. CO.

v.

BUCK.

(96 *Indiana Reports*, 346.)

A passenger being induced by the negligence of a railroad company to believe that a train had stopped at a station, walked off the car platform on a

dark night into a creek below. He was badly hurt, and when found was delirious; malarial fever was then developed, which resulted in the party's death. *Held*, that the death was so far the proximate result of the company's original negligence as to render said company liable in damages therefor.

A passenger has the right, when things indicate that the train is at his stopping-place, to presume that the train has stopped at a place where he may safely alight; and no court can, as a matter of law, declare him guilty of contributory negligence in alighting from the train in a dark night after the customary signal has been given for stopping at his known destination and the train has fully stopped near the usual alighting place.

APPEAL from the Montgomery Circuit Court.

ELLIOTT, J.—On the night of December 9th, 1881, the appellee's intestate, Andrew J. Buck, took passage on one of the appellant's passenger trains at the town of Darlington, for the station of Sugar Creek, not far distant. Both these stations were regular stations of the company at which passengers were received and discharged, and the train on which the deceased took passage stopped at Sugar Creek. About the time the train usually arrived at this station, and at the place where the signal whistle for the station was usually sounded, the engineer caused the customary signal to be given and applied the brakes, but the brakes did not stop the train and it ran by the station and was stopped on a trestle bridge, 385 feet beyond the usual stopping-place. The deceased stepped from the car in which he was sitting and fell through the bridge a distance of nineteen feet, and struck upon the rocks which formed the bed of the stream spanned by the trestle-work. The night was dark and there were no lights about the place where the train was stopped, and the length of the stop was about that ordinarily made at small passenger stations. The regular station was a safe place to alight, and the deceased lived not far distant and was acquainted with the station and its surroundings. The station had not been called at the time the deceased left the train, but there was evidence showing that it was not the custom of the railroad company's employes to call the name of the station. The deceased was found in the creek, and if not delirious when first reached, very soon became so, and was taken to a house near by. It was not far from eight o'clock when he fell from the trestle-work, and the physician who reached him at half-past ten o'clock thus described his condition: "I found him lying upon the bed on his left side, his head somewhat elevated, his body in a perspiration, right leg drawn up, left extended; there was a cut on his chin on the left side; it was about an inch and a half long; his left ankle was swollen, blood clot on either side, and there was a bruise on his back, low down. His eyes were closed; one of the pupils of his eyes was larger than the other, one dilated and the other contracted. He seemed to be suffering pain, groaning and crying and asking, 'Where am I? What has happened?'"

Where is Bess?' That is the name by which he called his wife. His sense of hearing seemed to be not acting, as he would not respond to questions except by a groan." The witness then stated that he took the temperature of his patient's body and stated the result of his examination in detail; visits were made on the 10th, 11th and 14th days of December, and the deceased was still suffering from the pain in his head. In answer to a question the physician said: "He was suffering from what we call a concussion of the brain; it continued until Jan. 14th, 1882, the day of his death." A visit was made on the 16th of December, and from that time visits were made daily and oftener until the death of the patient. A graphic description of the progress of the case was read from a book called "The Physician's Case Book," and from this testimony it appeared that the pain in the head and the surgical fever found present on the 10th day of December continued until the end, but that typho-malarial fever had supervened and that the immediate cause of death was hemorrhage from the bowels. The medical witness was asked on cross-examination how the injury contributed to the death of his patient, and he answered: "By receiving a fall on the 9th of December, and in that fall receiving a concussion of the brain. There was a condition of the brain in which his nervous system was affected, and by the sprained ankle which confined him to his bed, and the injury under his jaw and on his back by confining him to his bed put his system in a favorable condition to take whatever disease might be prevailing in the community, and the result of his being confined to his bed and the surgical fever he had following these injuries. He gradually drifted into malarial troubles which were then rife in our community. The shock that his nervous system had received and the depressing influence it had upon his system had rendered it less liable to bear the continued fever and typho-malarial fever, and this surgical fever put him in a condition to take on malarial fever, and the result of his malarial fever was hemorrhage of the bowels from which he died." At another place in his testimony the witness said that the injuries did, in one sense, produce the fever which resulted in death. Dr. Hopper, another physician, testified that he visited the deceased on the 11th day of January, and in answer to an interrogatory, gave it as his opinion "That the fall contributed to his death—the injuries received from falling off the trestle." It was proved that the malarial fever was epidemic in the vicinity of Sugar Creek station, and that the deceased, prior to the fall from the trestle-work, was in robust health. The contention of the appellant is that the evidence does not show that the injuries received by Andrew J. Buck caused his death. In order to discover a principle which will lead to a just decision of the question here confronting us, it will be necessary to reason from analogous cases, for we have

found no case precisely in point, nor have we found in any text writer a rule which governs such a case as this. A long settled rule of the common law adopted and enforced in criminal cases supplies a close analogy. One of the most philosophical of our law writers thus states this ancient rule: "Now these propositions conduct us to the doctrine that, wherever a blow is inflicted under circumstances to render the party inflicting it criminally responsible if death results, he will be deemed guilty of homicide, though the person would have died from other causes, or would not have died from this one had not other causes operated with it, provided the blow really contributed either mediately or immediately to the death sufficiently for the law's notice." 2 Bishop, C. L. Sec. 637. At another place this author says: "And the wound need not even be the cause concurrent; much less need it be the next proximate one, for if it is the cause of the cause no more is required." *Ibid*, Sec. 639. The greatest names among the sages of the law are arrayed in support of this doctrine. 1 Hales, P. C. 428; 1 Hawk, P. C. 93. It is sustained by the English, American and Prussian courts. It is the law of the State as declared in at least two cases, one of which was well discussed. *Kelley v. The State*, 53 Ind, 311; *Harvey v. State*, 40 Ind. 516. If it is sufficient to show in cases where life and liberty are involved that the wrong was the "mediate cause," it should surely be sufficient where nothing more than money is involved. In close agreement with the fundamental principle of which we have just spoken is the doctrine of the court in *Jeffersonville Co. v. Riley*, 39 Ind. 568, where it was held that the trial court properly refused to instruct the jury in an action like this, that the "injury cannot be regarded as the proximate cause of death, if the deceased had a tendency to insanity and disease, and the injury received by him would not have produced the death of a well person." Straight in line with our own case is that of *Drake v. Kiley*, 93 Pa. St. 492. In that case a lad was taken against his will on a freight train and carried a distance of five miles. He returned home on foot running most of the way, became ill and the ultimate result was that he became crippled in both legs, and it was held that the defendant was liable for all the injuries received. The court said: "The true rule is that the proximate cause must be determined by the jury upon all the facts in the case." If we were to undertake to declare any other rule than that stated in the case cited we should be involved in inextricable confusion, for it is clear that the passenger who suffers, as the appellate's intestate did, injuries of a serious character, is entitled to some damages, and it is impossible for any one to pronounce as matter of law at what the injury flowing from the wrong terminated. The only possible practical rule is that the wrong-doer whose act is the mediate cause of the injury shall be held for all the resulting damages, and that the question whether

his wrong was the mediate cause is one for the jury. But there are other cases sustaining the doctrine of this court. In *Gunner v. Second Avenue R. R. Co.*, 3 Hun, 494, affirmed on appeal, 67 N. Y. 596, the plaintiff received an injury through the negligence of the railroad company, which resulted in a development of a poisonous discharge causing death, and the company was held liable. It was there said: "More attentive treatment might have saved the life of the young man, but its necessity was not apparently suspected. He was subjected to that which followed and was designed to be proper by the wrongful act of the defendant. That was the cause which placed his life in jeopardy, because it produced the wound whose poisonous discharge resulted in his death. So it may be justly said of this case; it was the wrongful act of the appellant which placed the intestate's life in jeopardy. He who wrongfully places another's life in jeopardy is responsible for the loss of that life. The appellant did place the intestate's life in jeopardy, and is therefore responsible. The case of *Brown v. Milwaukee, etc., Co.*, 54 Wisc. 342, is strongly in point and contains an exhaustive review of the authorities. In that case a pregnant woman was carelessly directed by a brakeman to leave the train at a point three miles short of her destination, and she walked to her destination. This walk brought on a miscarriage and illness, and it was held that for these consequences the carrier was responsible. Many cases are cited in support of this ruling. A like decision was rendered in *Houston, etc., Co. v. Fredericks*, by the Supreme Court of Texas, see 41 Am. R. 56 n. In *Brown v. Milwaukee, etc., Co.*, *supra*, it was said of the *Pullman, etc., Co. v. Barker*, 4 Col. 344, that it is "unsustained by authority." The decision in *Santer v. N. Y., etc., Co.* 66 N. Y. 50, is that the representatives of one injured through the negligence of a railroad company are entitled to recover damages caused by his death, although the immediate cause of death was the mistake of the surgeon who treated him. In *Williams v. Vanderbilt*, 28 N. Y. 217, the carrier's negligence caused a passenger to be detained several weeks on the Isthmus of Panama, where he contracted a local fever, which disabled him for a long time after his return to New York, and this resulting injury was held a ground of recovery. A man by a wrongful act frightened a woman and caused her to flee from her house; in her flight she fell from a fence and a miscarriage and illness resulted, and the defendant was held liable for this consequential injury. *Barber v. Reese*, 60 Miss. 906. In the same line, but not quite so closely analogous, is the case of the *Penn. Co. v. Hoagland*, 78 Ind. 23, s. c. 3 Am. & Eng. R. R. Cas. 436, where it was held that damages were recoverable for illness caused by exposure to cold resulting from carelessness in directing a passenger to alight at the wrong station. It will be found on investigation that the decisions we have referred to are really mem-

bers of an old and well established class of cases going back as far at least as the case so famous in the books as the "Squib Case." They do no more than apply a well known principle to new and peculiar instances. This general doctrine is well stated in *Baltimore, etc., Co. v. Reaney*, 42 Md. 117, where it was said: "The law is a practical science, and courts do not indulge refinements and subtleties, as to causation, that would defeat the claims of natural justice. They rather adopt the practical rule that the efficient and predominating cause in producing a given event or effect, though there may be subordinate and dependent causes, must be looked to in determining the rights and liabilities of the parties concerned." At another place in the same opinion it is said: "To entitle such party to exemption he must not only show that the same loss might have happened, but that it must have happened if the act complained of had not been done." *Davis v. Garrett*, 6 Bing. 716. In a recent work it is said: "Any wrongful act which exposes one to injury from rain, heat, frost, fire, water, disease, the destructive or known vicious disposition or habits of animals, or any other natural cause which renders it probable that such an injury will occur, is a primary efficient and proximate cause, if the injury ensue. Many such cases have been referred to in the preceding pages." *Sutherland on Damages*, 62. In *Byrne v. Wilson*, 15 Irish C. L. 332, a stage coach in which the plaintiff was a passenger was thrown into a canal by the negligence of the driver, and the lock-keeper turned on the water, thereby causing the death by drowning of the plaintiff, and it was held that the proprietor of the coach was liable under Lord Campbell's act, the court saying: "The precipitation of the omnibus into the lock was certainly one cause (and it may also be said the primary cause) of her death, inasmuch as she would not have drowned but for such precipitation. It is true that the subsequent letting in of the water was the other and more proximate cause of her death, and that she would not have lost her life but for such subsequent act, which was not the necessary consequence of the previous precipitation by the defendant's servants. But in our opinion the defendant is not relieved from liability for his primary negligence, by showing that but for such subsequent act death would not have ensued. The chief justice in his opinion said: "The law is clear that every party is liable not only for the immediate consequences of his negligence, but also for the resulting consequences of his acts, whether those acts are acts of violence or negligence in breach of duty which imposed the necessity of care and caution upon him." Proceeding upon the general rule we have stated, the court, in *Eaton v. Ponton, etc., Co.*, 11 Allen, 500, said: "And it is no answer to an action by a passenger against a carrier that the negligence or trespass of a third party contributed to the injury." A like ruling was made in *Spooner v. City of Brooklyn R. Co.*, 54 N. Y. 226. The

case of *Hutchell v. Kimbrough*, 4 Jones L. (N. C.) 163, supplies an instructive illustration of the rule. There a roof was removed from the house and the eye of the plaintiff was lost in consequence of the exposure resulting and the defendant was held liable. The general rule is recognized and enforced by our own cases. *Billman v. Indianapolis, etc., Co.*, 76 Ind. 166; s. c. 6 Am. & Eng. R. R. Cas. 401; *City v. Smith*, 79 Ind. 311; *Burford v. Johnston*, 82 Ind. 428; *Dunlap v. Wagoner*, 85 Ind. 531; *Louisville, etc., Co. v. Kunning*, 87 Ind. 351; *Henry v. Davis*, 2 Ind. Law Mag. 254. We turn now to the cases cited by the appellee. We have already shown by the quotation made from the able opinion in *Brown v. Milwaukee, etc., Co.*, *supra*, that the case of *Pullman, etc., Co. v. Baker*, 4 Col. 344, is not sustained by authority, and we now add that it cannot be supported on principle. The case of *Krach v. Heilman*, 13 Ind. 517, and *Collier v. Early*, 54 Ind. 539, were shown in *Dunlap v. Wagoner*, 85 Ind. 531, to be in conflict with the cases of *Schlosser v. State*, 55 Ind. 82; *Fountain v. Draper*, 49 Ind. 541; *Brainaby v. Wood*, 50 Ind. 405, and *English v. Bead*, 51 Ind. 489, and to be condemned by other courts as well as by text writers. It remains to add that the cases of *Ryan v. New York, etc., Co.*, 35 N. Y. 210, and *Fairbanks v. Kerr*, 70 Pa. St. 86, on which the cases of *Krach v. Heilman* and *Collier v. Early* are mainly founded, are in direct conflict with the decision in *Louisville, etc., Co. v. Kunning*, 87 Ind. 351. Not only is this true, but it is also true as shown by Judge Cooley that the cases of *Ryan v. New York, etc., Co.*, and *Fairbanks v. Kerr* are everywhere repudiated. Cooley on Torts, 76 n. The courts of New York have not followed *Ryan v. New York, etc., Co.*, it very clearly appears from the decisions in *Webb v. Rome, etc., R. Co.*, 49 N. Y. 420; *Pollett v. Long*, 56 N. Y. 200; *Wisner v. Delaware, etc., Co.*, 80 N. Y. 212. We need not stop to inquire whether the case of *Shaffer v. Railroad Co.*, 105 U. S. 249, is sustained by authority or not, for it is readily discriminated from the present case, where the court held that the representative of one who became insane from an injury received in a collision and eight months afterward took his own life, would not recover. The court said "the proximate cause of Shaffer's death was his own act of self-destruction." * * *

"The argument is not sound which seeks to trace this immediate cause of death, through the previous stages of mental aberration, physical suffering and eight months' disease and medical treatment, to the original accident on the railroad." There is a plain difference between the case cited and the case at bar. In the former the immediate cause of death was an independent agency, and between the original injury and the death many other causes had intervened and a long time had elapsed, while in this case the death occurred soon after the injury, and the effects of the injury were unbroken and continuous from the time it was received until

death ensued. In the case cited the violent act of the man himself produced the death, while in the one in hand a disease superinduced by the injury caused the death, and there was no break in the line of causation. A carrier of passengers is held to the exercise of a very high degree of care, and for a failure to use this care is responsible to a passenger who suffers an injury in a case where no fault of his contributes. It was said by this court in *Jeffersonville, etc., Co. v. Hendricks*, 26 Ind. 228, in speaking of the duty of railroad companies, "But they are required to use the highest degree of care to secure the safety of passengers, and are responsible for the slightest neglect, if any injury is caused thereby." There are many cases in our own reports to the same effect. *Cullenwater v. Madison, etc., Co.*, 5 Ind. 339; *Thayer v. St. Louis Co.* 22 *Id.* 26; *Sherlock v. Arling*, 44 *Id.* 184; *Louisville, etc., Co. v. Kelley*, *supra*. The rule is stated in stronger terms by the courts elsewhere as well as by the text writers. *Hutchinson on Carriers*, Secs. 500, 501 n; *Thompson on Carriers*, 200, 204. It is the duty of railroad carriers of passengers to stop at the regular stations and at safe places for alighting. *Thompson* says: "It is the duty of the servants of the railway company to run their trains so that a passenger shall have a reasonably safe place for alighting." This is substantially declared in the *Jeffersonville, etc., Co. v. Parmalce*, 51 Ind. 42; *Thompson on Carriers*, 228. In the *Memphis, etc., Co. v. Whitefield*, 44 Miss. 466, the court said: "Stopping the train at an unusual place rendered the company presumptively in the wrong to that extent, and the onus of explaining this neglect was thrown upon the defendants. *Shearman & Redf. Negl.*, Secs. 12-280; *Curtis v. R. Co.*, 18 N. Y. 534; *Angell on Carriers*, Sec. 369. 2 *Redf. R. W.*, Sec. 176." It is said by *Hutchinson*: "The passenger is entitled not only to be properly carried, but he must be carried to the end of the journey for which he has contracted to be carried, and must be put down at the usual place of stopping." *Hutchinson on Carriers*, Sec. 612. In *Prager v. The Bristol, etc., Co.*, 24 L. T. (N. S.) 105, the train ran by the platform and the passenger was injured in leaving the car. The carrier insisted that there was no evidence of negligence, but *Cockburn, C. J.*, said: "The question is whether there was a want of reasonable care on the part of the defendant, and I think there was not only evidence, but abundant evidence of this." The case of *Cockle v. South Erie, etc., Co.*, 27 L. T. (N. S.) is very similar to the one just cited, and a like ruling was made. In the case last named it was said: "But it appears to us that the bringing up of a train to a final standstill for the purpose of the passengers alighting, amounts to an invitation to alight, at all events after such a time has elapsed that the passenger may reasonably infer that it is intended he should get out if he proposes to alight at the particular station." It is held in the case cited and in many

others, that where the stop is made at a dangerous place near the usual station, and about the usual time for stopping, that the carrier should warn the passengers not to leave the train, or should apprise them of the dangerous place. *McLean v. Burbank*, 11 Minn. 270, *vide op.* page 233; *Mainy v. Talmage*, 2 McLean, 164; *Lang v. Colder*, 8 Pa. St. 483; *Stokes v. Saltonstall*, 13 Peters, 192; *Montgomery v. Bonny*, 51 Ga. 587. The case of *Penn. R. Co. v. White*, 88 Pa. 327, is very like the present, and the plaintiff was held entitled to recover, the court saying: "It is the duty of the company to provide for the safe receiving and discharging of passengers. It is bound to exercise the strictest vigilance not only in carrying them to their destination, but also in setting them down safely, if human foresight and care can do so." *Railroad Co. v. Aspell*, 11 Harris, 147. Applying the law as declared by the authorities cited, and many more might be added, it is clear that there was a breach of duty in running by the station and stopping at a dangerous place. A rule adopted by this court and sanctioned by many authorities of the highest character here requires attention. That rule is thus stated by Judge Redfield: "The fact that injury was suffered by any one while upon the company's trains as a passenger, is regarded as *prima facie* evidence of their liability." Redfield on Carriers, Sec. 341. Professor Greenleaf's statement of the rule is substantially the same. Greenleaf on Evidence, Sec. 227. Judge Cooley gives the question careful consideration and makes a like statement of the rule. Cooley on Torts, pp. 660, 663. In the early English case of *Christie v. Griggs*, 2 Campbell, 79, it was said: "The plaintiff had made a *prima facie* case by proving his going on the coach, the accident and the damage he had suffered." This rule has long been recognized by our cases as the correct one. In speaking of the effect of evidence of the fact that an injury was received by the passenger, it was said, in *Jeffersonville, etc., Co. v. Hendricks*, 26 Ind. 223: "Ordinarily the fact should be regarded as *prima facie* evidence of negligence on the part of the company," and this statement of the rule is adopted in the subsequent cases of *Sherlock v. Alling*, 44 Ind. 184; *Pittsburgh, etc., Co. v. Williams*, 74 Ind. 462; *Cleveland, etc., Co. v. Newell*, 75 Ind. 542; s. c. 8 Am. & Eng. R. R. Cas., 377; *Memphis, etc., Co. v. McCool*, 83 *Id.* 392. In the case last named many authorities are cited to which may be added *Railroad Co. v. Walrath*, 38 Ohio St. 161; *Phila., etc., Co. v. Anderson*, 94 Pa. St. 351; s. c. 6 Am. & Eng. R. R. Cas., 407; *Indianapolis, etc., Co. v. Thompson*, 93 U. S. 291; *Roberts v. Johnson*, 58 N. Y. 613; *Pittsburgh, etc., Co. v. Pillow*, 76 Pa. St. 510. The rule is a general one and is stated in general terms, and it is not to be understood that it goes to the extent of supporting a claim to a recovery where the evidence shows there was no negligence on the part of the carrier, or rebuts the pre-

sumption of negligence. It must, therefore, be true in most instances that the negligence or freedom from negligence will appear from the evidence, because in proving the occurrence from which the injury resulted, the nature and cause of the accident will necessarily appear. Of course, if the evidence rebuts the presumption of negligence, there cannot be said to be a *prima facie* case, although there may be an accident and an injury. In some of the cases a view is taken that if a thing occurs which ought not have occurred had the requisite degree of care been exercised, that then the carrier must show that such care was exercised. In one case it was said: "But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from the want of care." *Scott v. London, etc., Co.*, 34 L. J. Exch. 220. Of the case cited a judge, perplexed by the confusion consequent upon departure from the ancient rule, said: "I now gladly turn to one case distinguished from the chaos of authorities depending upon particular facts by an attempt at the application of something like a principle." *Flannery v. Wareford*, 11 Irish C. L. 30. In the case at bar there was no evidence explaining the failure to stop at the regular station, nor was there any explanation of the failure to give warning, neither was there any explanation of the cause of stopping on the dangerous trestle bridge. We think the evidence fully sustains the finding that there was negligence on the part of the appellant.

The remaining question is whether the intestate was guilty of such contributory negligence as bars a recovery. The question of contributory negligence is generally one for the jury, and courts interfere with the verdict only in clear cases. *Gaston v. City*, 58 Ind. 224; *Penn. Co. v. Henril*, 70 *Id.* 569; *Louisville, etc., Co. v. Richardson*, 66 *Id.* 43; *City of Washington v. Small*, 86 Ind. 462, see page 469; *Penn. Co. v. White*, 88 Pa. St. 327; *Willard v. Pinard*, 44 Vt. 34. The court cannot declare as matter of law that a passenger is guilty of contributory negligence who alights from a train in a dark night after the customary signal has been given for stopping at his known destination and the train was fully stopped near the usual alighting place and near the time when it was there due. We have already quoted from cases holding that a passenger who alights when a train is brought to a full stop near the usual alighting place is not guilty of contributory negligence in attempting to leave the train, unless it appears that the danger was apparent, and we now direct attention to other cases bearing upon the same subject. In *Robson v. The North-Eastern Railway Co.*, 10 Law R. 271, the train overshot the plat-

form, but the station was not called, and the passenger attempted to alight and was injured. It was held that a nonsuit was improperly directed. It was held, "that there was evidence from which the jury might have properly found that the plaintiff was invited or had reasonable ground for supposing she was invited to alight by the company's servants." The language of the courts in *Curtis v. Detroit, etc., Co.*, 27 Wis. 158, clearly states a general principle applicable to this case: "If, under the circumstances of this case, the train in being brought to a stop in such a manner as to induce the belief on the part of the passengers in waiting on the platform that it had stopped for the reception of passengers, and then, when the passengers, acting on this belief, were going aboard, started again without caution or signal, that would constitute negligence on the part of the company, and be so without regard to the question whether the starting was one of necessity or not, or whether the stop was an actual or only an apparent one. It was the duty of the company, if the passengers were not to enter the cars under such circumstances, to have some one there to warn and prevent them." In our own case of *Evansville, etc., Co. v. Duncan*, 28 Ind. 444, a complaint, after alleging that the plaintiff took passage for Fort Branch and like matters, stated that, by the carelessness of the defendant, the train stopped at the town of Fort Branch before that part of the train on which the plaintiff was seated had reached the depot, and that by reason thereof the plaintiff was compelled to jump from the car to the ground, and the complaint was held sufficient, the court saying: "As to the second objection, it is sufficient to say that we do not understand from the averments that the rash conduct of the plaintiff produced the injury." In the *Columbus, etc., Co. v. Farrell*, 31 Ind. 408, the general doctrine we have is recognized and enforced. In *Jeffersonville, etc., Co. v. Hendricks*, 41 Ind. 48, the court said: "Was not the attempt of the deceased to leave the cars, under the facts stated, made under such circumstances that a person of ordinary caution and care would not have apprehended danger therefrom? If it was, then the deceased was without fault or negligence, and in our opinion the decedent was not guilty of negligence in attempting to leave the train under the circumstances." The question stated in the quotation is that which arises in all cases of kindred character, and is one, as a general rule, to be left to the jury. The principle that a man is not guilty of contributory negligence who acts upon a reasonable belief arising from surrounding circumstances is one of wide application, finding, perhaps, one of its most striking applications in that class of cases where a passenger leaves a train in order, as he believes, to escape impending danger. *Stokes v. Saltonstall*, 13 Peters, 181; *Twombly v. Central Park, etc., R. Co.*, 69 N. Y. 168; *Wilson v. Northern Pac. R. Co.*, 26 Minn. 278; *Iron R. Co. v. Morrey*, 36 Ohio St. 481.

In all such cases the passenger is excused, even though his belief was an erroneous one, and but for his leaping from the train no injury would have resulted. Without going further into the subject, although many more authorities might be cited, we conclude by a quotation from a recent English author, who, after a thorough review of the adjudged cases, says: "But the question of what circumstances amount to an invitation to alight, is clearly one for a jury, and although there seems to have been difficulty felt in times past by some of our judges in reference to this point of law, it seems impossible that any further doubt should exist." *Browne on Carriers of Passengers*, 507. The principles we have stated rule the case and dispose of all the questions presented, whatever form they may assume.

Judgment affirmed.

Proximate and Remote Cause.—The opinion in the principal case contains so complete a collection of the authorities on this subject, that we deem it sufficient to refer our readers to it for information on that point. See *Baltimore City Pass. Ry. Co. v. Kemp*, *infra*, and cases cited in note.

When Passenger is Justified in Presuming that Train has Reached Station.—As to when a passenger is justified in assuming that a train has reached a station and when he may therefore undertake to alight in the dark. *Mitchell v. Chicago & Grand Trunk R. Co.* and note, *supra*.

SEVIER

v.

VICKSBURG & MERIDIAN RAILROAD COMPANY.

(61 *Mississippi Reports*.)

If a man enters a car while sick, and goes to sleep, the conductor is not bound to wake him at his stopping-place. The conductor's agreement to arouse a sleeping passenger imposes no obligation on the railroad company. The company is not, therefore, liable in such case for carrying the passenger beyond his destination.

APPEAL from the Circuit Court of Hinds county.

The appellant's declaration in trespass on the case, to which the appellee's demurrer was sustained, stated that the plaintiff paid his fare from Vicksburg to Jackson, Mississippi, and the defendant corporation, being a common carrier between Vicksburg and Meridian, promised and agreed to convey him to Jackson, which is on the line of its railroad, "and accordingly, said plaintiff, who was sick with fever, got on one of the defendant's cars at Vicksburg, to be transported, and his ticket was duly taken from him by the conductor of the train as the agent of said defendant, whereupon said plaintiff, long before arriving at Jackson, informed the

defendant, through its said agent and conductor, that he was quite sick with fever and wanted to sleep as he felt very drowsy, but feared he might not awake at Jackson, where he was compelled to leave the train; and thereupon the company through said agent and conductor told the plaintiff that he could safely sleep and should be awakened by said agent and conductor when the train arrived at Jackson, and to lie down on the seat and sleep; and, accordingly, the plaintiff, who was very sick with violent fever, did, relying on the defendant's promises, lie down and sleep, and gave no thought to being awake when the train should reach Jackson, and remained sleeping and did not awake at Jackson, and continued sick and asleep; but said defendant, disregarding its duties and obligations to plaintiff, did not awaken said plaintiff at Jackson, and transported him so asleep and continuing sick," four miles east of Jackson, and then stopped the train and let him get off at night in the woods, and he was compelled to walk back sick, late at night, at the risk of his life.

Calhoun & Green, for the appellant.

It is by no means certain that the conductor could not bind the company by telling a person who was not sick that he might sleep. There is nothing to advise passengers of the extent of his authority. He is the company's agent about the management of the train, and his engagements, on which passengers act, are the undertakings of the company. Railroad companies have been held bound by a ticket agent's assurance to a purchaser that he could stop over on the ticket, *Burnham v. Grand Trunk Railway Co.*, 63 Maine, 298; by a conductor's promise to put off a passenger at a flag station, *Hurt v. Southern Railroad Co.*, 40 Miss. 391; by an employé's advice to step from one car to another on a moving train, *McIntyre v. New York Central Railroad Co.*, 37 N. Y. 287; and by promises about baggage by depot servants. *Minter v. Pacific Railroad Co.*, 41 Mo. 503; *Warner v. Burlington Railroad Co.*, 22 Iowa, 166; *Quinn v. Power*, 87 N. Y. 535; *Treat v. Boston Railroad Co.*, 131 Mass. 371; s. c. 3 Am. & Eng. R. R. Cas. 423. But sick, aged, infirm, young or crippled persons are entitled to more consideration from carriers than well persons. *Sheridan v. Brooklyn Railroad Co.*, 36 N. Y. 39; *New Orleans Railroad Co. v. Statham*, 42 Miss. 607. Sickness enlarges the conductor's power to meet the emergency. Story on Agency, Sec. 85. Human freight must be transported under rules adapted to its infirmities.

Nugent & McWillie, for the appellee.

Railroad trains are not hospitals, or conductors nurses of sick people. The duties of this officer are important, public, and well known, and he has no right to encumber himself with the care of a man who is very ill and sleepy too. A person who has to be stirred in order to keep awake, should, before entering a train, provide himself with a stirrer, for he cannot, with justice to the other

passengers, impose on the conductor the duty of stirring him up. Nothing about the conductor's general employment, which is running the train and taking the tickets, could induce an observer to infer that a part of his duty was to shake sleepy men. His duty is to see that the train is stopped at each station and the name of the place called out. The human freight is expected to get up and walk out at the right place. *Wabash Railway Co. v. Rector*, 9 Am. & Eng. R. R. Cas. 264. The conductor cannot neglect his duties to all the passengers in order to accommodate one. He must not take the risk of inconveniencing the public for the sake of a single passenger. *Ohio Railway Co. v. Hatton*, 6 Cent. L. J. 389; *Ohio Railway Co. v. Applewhite*, 52 Ind. 540. A ticket gives the right to the accommodation of the train only according to the usual regulations. *Lake Shore Railroad Co. v. Pierce*, 3 Am. & Eng. R. R. Cas. 340; *Loyd v. Hannibal Railroad Co.*, 53 Mo. 509; *Beauchamp v. International Railroad Co.*, 9 Am. & Eng. R. R. Cas. 307. A passenger has no right to ask a conductor to do what is not his duty and may cause a neglect of his business, and if the officer does agree, he does not bind the railroad company. Running a train on schedule time, making all the stops and taking all the tickets, require the officer's undivided attention. The lives of the passengers as well as their convenience in making connections and the like are in his care. And it is a violation of his obligations to the company and the public for him to fill his mind with engagements to awaken men at this and that stopping-place. The points decided in the cases cited for the appellant are not analogous to this question.

CAMPBELL, C. J.—It was not the duty of the conductor to arouse the appellant on the arrival of the train at Jackson by any special means applicable to his condition as being sick and drowsy. The business of the conductor was to manage the train according to the established regulations, and not to vary them for an individual. Regulations are made for the traveling public, and should be reasonable as adapted to the convenience of this public. If persons sick or under any disability which renders them unable to conform to the reasonable regulations for the community generally are inconvenienced by this inability, they have no legal cause of complaint against a carrier who undertakes to carry the public generally, according to a plan adopted to suit persons, generally, in a condition to travel, and not designed to meet the wants of those not in such condition. The obligation of the carrier was to carry the appellant safely to Jackson, and on arrival there to announce the fact, and afford an opportunity for him to leave the car. That he was asleep, and that his sleep was induced by sickness did not entitle him to special attention. It was his misfortune to be sick, and yet called on to act as a well man, being on a train run

for those able to travel on cars and conform to the regulations for their operation. One too sick or unable from any cause to do as travelers usually do, in conforming to the usage in running trains for the traveling public, should avoid them or secure the assistance necessary to enable him to accomplish what is required of passengers generally. Carriers are not required to adapt their methods to the circumstances of those not in condition to comply with the requirements made of travelers generally.

The agreement of the conductor to rouse the appellant at Jackson did not impose any obligations on the railroad company. The appellant was bound to know that the conductor had no authority to incur an obligation to that effect for the company, and that his duty was to the passengers generally, and not to him particularly. He must be held to have known the established usage of calling out the name of the station and for the passenger to leave the car on its arrival at his destination, and that the promise of the conductor was his personal obligation, and was not the promise of the company, which he had a right to bind by an undertaking in behalf of one of many passengers, to all of whom, respectively, the company owed the same duties.

Whether sudden illness occurring to one on board a train after going upon it, and made known to the conductor, would create such an emergency as to impose the duty on him to give such passenger needed attention and vary the course of dealing with passengers, is purposely left an open question to be decided when it arises. This case does not present it, for the averment of the declaration is that the plaintiff was sick when he went upon the car. This being his condition, he must be held to have taken the risk of an increase of his malady to such an extent as to disable him from performing the part of a traveler on the train.

Judgment affirmed.

ST. LOUIS, KANSAS CITY & NORTHERN RAILWAY COMPANY

v.

MARSHALL.

(78 *Missouri Reports*, 610.)

In an action against a railroad company for carrying a female passenger beyond her station, the circumstances were such that the plaintiff was only entitled to recover for the loss of time and expense incurred in being taken past her station and back, and the jury were so instructed. The evidence showed that she lost two or three hours' time and paid \$1.50 for a returning conveyance. There was a verdict for \$1,000, reduced by remittitur to \$750, and judgment accordingly. *Held*, excessive, and judgment reversed.

A passenger buying a ticket to D. station on defendant's road, was told by the ticket agent to take a particular train. She did accordingly. The

train proved to be an express, not allowed by the regulations of the company to stop at D., but she did not know this until informed of it by the conductor after the train had started. She told him of the direction the agent had given her, and insisted on being left off at D. He took up her ticket, but refused to stop at D., and took her to the next stopping-place beyond. In an action against the company; *Held*, that the plaintiff ought to have counted on the negligent misdirection of the ticket agent, not on the refusal of the conductor to stop, for he could not have done otherwise.

APPEAL from Chariton Circuit Court.

Wells H. Blodgett, for appellant.

Samuel C. Majors, *C. W. Bell* and *S. P. Houston*, for respondent.

HOGAN, C. J.—The material portion of the petition in this case is as follows: That defendant, on or about the 11th day of October, 1878, for a reward, undertook and agreed to convey plaintiff safely from Kirksville, in Adair county, to Dalton, in Chariton county, but that wholly neglecting and disregarding its duty in that behalf, maliciously or wantonly and wrongfully refused to put plaintiff off at Dalton, but carried her on to Brunswick, and that by reason of said wrongful act of defendant she was damaged in the sum of '\$5,000, for which she prays judgment. The defendant in its answer denied each and every allegation contained in the petition.

The plaintiff testified as follows: "I reside at Newark, Knox county, Missouri. On October 11th, 1878, I bought from defendant's agent at Kirksville a ticket from Kirksville to Dalton. I asked the agent if he could sell me a through ticket to Dalton (I knew I would have to make a change at Moberly), and he said he could. He got the ticket and I paid him for it. I asked what time the train would go out; it was then after eight o'clock, and he said the train left ten minutes after nine. I asked him what time it would get to Moberly, and he told me. I said, how long will I have to wait there, and he said something over two hours. I then paid him for the ticket. I then asked him if I would have any trouble in making the change at Moberly, or in getting off at Dalton, and he said: 'No, madam, none at all; the officers all along this road are gentlemanly and accommodating.' I got on board the train and went to Moberly, and got off there a little after twelve, and went into the waiting room. I was not informed at Moberly that the train did not stop at Dalton. I sat quietly in the depot over two hours. They said the train was behind time. It was in the night, but the train finally came along, and I got on board. The first time the conductor came along after I got on at Moberly, I handed him my ticket, and he said: 'I cannot put you off at Dalton, we do not stop there.' I said: What did they sell me a ticket for, then? He said he would take me on to Brunswick, but could not stop at Dalton. I

insisted that he should stop there, and he said: 'No, madam, we cannot stop there.' Shortly afterward he came through the car again and I called to him and told him the circumstances; that my daughter-in-law was very sick, and he said: 'No, madam, I cannot put you off; I have no more right to put you off there than I have to stop at any farm house on the road; I cannot do it.' A lady spoke up and said: 'If she had no ticket you would put her off'—which seemed to annoy him, and he walked off. He came in the third time, and I called to him and said: I have not a particle of baggage, and it won't detain you three minutes. He said: 'I understand the matter perfectly and do not intend to stop.' His manner was rude and abrupt. He did not use any insulting language but was abrupt and impatient. He took me on to Brunswick, and I did not say any more at all. I got out at Brunswick, and got a carriage as soon as I could and went out to Mr. Redman's. It was ten minutes after nine when I got there and I found my daughter-in-law had just died. I did not explain to the agent at Kirksville the circumstances under which I was going, but did explain to the conductor. I bought the ticket from the agent in the depot. I walked up to the door where everybody bought tickets and he sold me the ticket for \$3.25. At Brunswick I hired a conveyance to take me out to Mr. Redman's where my daughter-in-law was sick; that is three and a half miles from Dalton and twelve and a half from Brunswick. I paid for the conveyance \$1.50, and I got there ten or twelve minutes after nine. When the train passed Dalton it was not daylight, and the stars were shining when I got to Brunswick. The agent at Kirksville told me to get on the first passenger train. He told me to take the first train that came along after I got to Moberly, and that is why I took it."

Cross-examination: "After I left Kirksville, the next conversation I had with the railroad officials was with the conductor after I left Moberly. The conductor said he could not put me off at Dalton. In the first conversation I had with the conductor he told me to go on to Brunswick. The conductor said he was near forty minutes behind time. He gave me the pass back from Brunswick to Dalton, but I objected. I said: 'I do not want your pass,' but he gave it to me. In the depot at Kirksville I did not see any notice posted up in regard to the running of trains. I cannot see to read very well after night, and I did not see anything of the kind. In the first conversation the conductor said Dalton was not on his bill to stop, and that is all he said at that time. In the next conversation he again said he could not stop. In the last conversation he said he was behind time, and he turned off in a rude and abrupt manner after the third conversation. He gave me the pass the first time. He said the train on which I would go back would reach Dalton after nine o'clock, and I said:

‘I cannot wait that long.’ The conductor on the train from Moberly to Dalton took up my ticket. He took it up when he first met me, and that is the time he gave me the pass, but I told him I did not want the pass, but that I wanted to stop at Dalton. In my last appeal I said: ‘If you will slacken the speed of the cars, I will get off at the back of the car and risk the danger;’ and he said: ‘I am not going to do it.’ This was in the third and last conversation, and his manner was rude and abrupt. I knew he was out of patience. I do not know that there was anything abrupt in the first two conversations, but there was nothing like kindness, there was barely politeness. The agent at Kirksville told me to take the first passenger train going to Dalton; that conversation occurred at the time I purchased my ticket at Kirksville. The agent told me to take the first train going to Dalton. I cannot say that he said those words, but that was it to the best of my recollection.” This was all the evidence offered by plaintiff in the case.

The conductor of the train which carried the plaintiff beyond her destination testified that his train was an express train, running from St. Louis to Kansas City, and that there were twelve or fourteen stations at which he did not stop; that said train was known as number three, and was not allowed to stop at Dalton, and on the occasion referred to he had no authority to stop his train at Dalton. Trains number one and two stopped at Dalton regularly. On the morning in question his train was behind time and arrived at Brunswick fifteen or twenty minutes late.

The following stipulation was then made in open court between the attorneys for plaintiff and defendant, to wit: “It is admitted by counsel for the plaintiff that train number three, on which plaintiff got on board at Moberly, was the through express train from St. Louis to Kansas City, and that by the time-table and schedule of running arrangements in force on defendant’s railroad at said date it was not advertised to stop at Dalton, and that Dalton was not a stopping-place for said train by said schedule.”

At the instance of the plaintiff the court gave the following instructions:

1. If the jury believe from the evidence before them that plaintiff purchased of defendant’s agent at Kirksville a ticket from Kirksville to Dalton, and that at the time she so purchased the ticket, defendant’s agent directed her to take the 9:20 p. m. train for Moberly, and to get on the first passenger train going toward Dalton after she arrived at Moberly, and that she did so, and that the conductor took her ticket and refused to let her off at Dalton, but carried her past to Brunswick, then they should find for plaintiff, unless they further believe from the evidence that before she got on the train at Moberly she knew that the train did not stop at Dalton.

2. If the jury find for the plaintiff they should assess the damages at a reasonable sum for loss of time and expense incurred in being taken from Dalton on to Brunswick, and from Brunswick back to Dalton, as they may believe from the evidence plaintiff is entitled to recover, not exceeding the sum of \$5,000.

At the instance of the defendant the court gave the following instruction :

1. If the jury believe from the evidence that plaintiff purchased a ticket for a valuable consideration of defendant's agent, and defendant thereby undertook to convey plaintiff as a passenger in its cars from Kirksville to Dalton, and that defendant's servants failed to stop its train upon which plaintiff was lawfully a passenger for Dalton, at said station, but carried her on to Brunswick, then they are instructed that plaintiff's measure of damages is the sum the evidence shows plaintiff expended to enable her to return to Dalton, the value of the time lost, and the inconvenience she suffered thereby, but they must allow the plaintiff nothing for and on account of the mental anxiety or suffering endured by her on account of the sick or dying condition of her daughter, occasioned by such delay in reaching her destination.

The jury returned a verdict for plaintiff and assessed her damages at \$1,000, of which the plaintiff remitted the sum of \$250, and the court thereupon rendered judgment for the plaintiff for \$750.

On the authority of the case of *Trigg v. St. Louis, K. C. & N. Ry. Co.*, 74 Mo. 147 ; s. c. 6 Am. & Eng. R. R. Cas. 345, the judgment in this case must be reversed, because the damages are excessive. In the instruction given at the instance of the plaintiff, the jury were directed to assess the damages at such reasonable sum for loss of time and expense incurred in being taken from Dalton on to Brunswick, and from Brunswick back to Dalton, as they might believe from the evidence plaintiff was entitled to recover. The action of the jury in returning a verdict for \$1,000 on the testimony before them under this direction of the court, which was substantially repeated to them in the instruction given for the defendant, is such as to call for the interposition of this court. The verdict is without evidence to support it.

As the cause must be remanded, we think it proper to state that the petition should have counted on the negligent mistake or misdirection of the agent at Kirksville, and not on the refusal of the conductor to stop the train at Dalton. The conductor was not guilty of negligence in refusing to stop his train at Dalton, for he was forbidden to do so by the rules of the company; for if he had stopped there in violation of his duty and the regulations of the company, and injury had resulted to any one from such violation of duty, the company would have been liable therefor. If the conductor of a through train, which by the regulations of the

company is permitted to stop only at a few important stations on its transit, can be required to stop his train at any way-station on the statement of a passenger that he was informed by some agent of the company authorized to give such information, that the train would stop at such station and that he had been directed to take that train, the movement of such train would virtually be withdrawn from the control of the company, and placed under the control of the passengers, and in lieu of that precision, regularity and security which should be required in the management of passenger trains, only uncertainty, irregularity and insecurity would prevail. In many instances the conductor would have no means of testing the good faith of the representations made to him by the passenger, and he would have to act blindly, at the risk of injury to his master, and to the passengers committed to his care. When any servant of a railroad company, having the requisite authority, misdirects a passenger to his injury, the company should be responsible therefor, but in an action for such injury, the petition should be founded upon such misdirection.

The judgment will be reversed, and the cause remanded. The other judges concur, except Ray, J., who, having been of counsel, did not sit.

Damages for Carriage of Passengers Past Destination.—A full review of the authorities relative to the measure of damages when a passenger has been carried past his destination will be found in the note to Cincinnati, H. & L. R. R. Co. v. Eaton, *infra*.

Passenger Bound to Inform Himself whether Train Stops at His Destination.—A person taking passage upon a train is generally bound to inform himself beforehand whether the train stops at the station which is his destination. Pittsburgh, C. & St. L. R. Co. v. Nuzum, 50 Ind. 141; Ohio & Miss. R. R. Co. v. Applewhite, 52 Ind. 540; Chicago & Alton R. R. Co. v. Randolph, 53 Ill. 510; Lake Shore & Mich. S. R. R. Co. v. Pierce, 8 Am. & Eng. R. R. Cas. 840; Beauchamp v. International & Gt. N. R. Co., 56 Tex. 239; s. c. 9 Am. & Eng. R. R. Cas. 307; Logan v. Hannibal & St. Joe R. R. Co., 12 Am. & Eng. R. R. Cas. 141. If he fails to do so and by mistake gets upon an express train and is carried past his destination, he cannot recover damages. Fink v. Albany & Susquehanna R. R. Co., 4 Lans. 147.

Passenger Bound to Inform Himself whether Train Runs in Proper Direction for His Destination.—In like manner a passenger is bound to see that he gets upon the right train for his destination and not upon a train bound in some other direction. Page v. New York Central R. R. Co., 6 Duer, 528; Barker v. New York Central R. R. Co., 24 N. Y. 599; Hobbs v. London & S. W. R. Co., L. R. 10 Q. B. 111.

How far Passenger may Rely upon Representations of Ticket Agent as to Stoppage of Trains.—A passenger may rely upon the representations of a ticket agent as to where a train stops, provided he has not afforded him such additional information on the point as no reasonable or prudent man would fail to notice and regard. Pittsburgh, C. & St. L. R. Co. v. Nuzum, 50 Ind. 141; Barker v. New York Central R. Co., 24 N. Y. 599; Page v. New York Central R. Co., 6 Duer (N. Y.), 528; Lake Shore & Mich. S. R. Co. v. Pierce, 8 Am. & Eng. R. R. Cas. 840.

Passenger Cannot Demand Stoppage of Through Train at Way Station Named in His Ticket.—A passenger who has been misinformed by the ticket agent as to where a certain train stops is not entitled to demand of the conductor that he should stop the train contrary to the rules and regula-

tions of the company. *Lake Shore & Mich. S. R. Co. v. Pierce*, 3 Am. & Eng. R. R. Cas. 340; *Logan v. Hannibal & St. Joe R. R. Co.*, 12 Am. & Eng. R. R. Cas. 141. The act of the conductor in receiving the passenger's ticket in such case does not bind him to stop at the place indicated in the ticket. *Ohio & Miss. R. R. Co. v. Hatton*, 60 Ind. 12; *Chicago & Alton R. R. Co. v. Randolph*, 53 Ill. 510.

But see *Pennsylvania Co. v. Wentz*, 37 Ohio. St. 333; s. c. 3 Am. & Eng. R. R. Cas. 478.

CINCINNATI, HAMILTON & INDIANAPOLIS RAILROAD COMPANY

v.

EATON.

(94 *Indiana Reports*, 474.)

In an action sounding in tort, by a passenger against a railroad company, for carrying her beyond her place of destination, there being evidence of failure to stop the train at the place, that she was landed where no conveyance could be procured, and that she then walked, in the night, a distance of five miles, she was not allowed to prove further that the walk occupied three hours over dusty roads, that in crossing a creek she got her clothing and feet wet, that she was chased by dogs, and otherwise frightened, and that the weather was hot and sultry, in consequence of which she became and remained sick for some time. *Held*, that the evidence was admissible.

FROM the Superior Court of Marion county.

A. C. Harris, *W. H. Calkins* and *R. B. Marshall*, for appellant.

I. M. Krutz, *J. S. Duncan*, *C. W. Smith* and *J. B. Wilson*, for appellee.

NIBLACK, J.—On the afternoon of the 12th day of July, 1881, Mrs. Mary M. Eaton purchased of the proper agent at the Union Depot, at Indianapolis, a ticket entitling her to transportation over the railroad belonging to and operated by the Cincinnati, Hamilton & Indianapolis Railroad Company, from that depot to Morehouse, a flag station a few miles east of Indianapolis, and soon thereafter, that is to say, on the same afternoon, entered a train of that company's cars which stopped regularly at Morehouse when signaled to do so. Her place of ultimate destination was the house of a brother-in-law, named Graham, who lived three miles south of Morehouse, and she expected Graham to meet her at Morehouse upon her arrival at the place. After leaving Indianapolis the conductor took up her ticket, but, for some unexplained reason, failed to signal the engineer to stop at Morehouse, and in consequence the train did not stop at that station.

When Mrs. Eaton discovered that the train was passing Morehouse without stopping, she appealed to a gentleman sitting near

her for assistance, and requested him, if possible, to have the train stopped at the approaching crossing of a dirt road, saying that she would be willing to get off at that place. The gentleman went forward and soon returned with a brakeman on the train, who informed Mrs. Eaton that the train could not be stopped between stations as she had requested, but that they (meaning those in charge of the train) would take her on, free of charge, to Rushville, where they would meet another train, upon which they could send her back to Morehouse, thus enabling her to reach that place on her return at or near eleven o'clock that night. She declined to be set down at Morehouse at that time of night, and hence rejected the offer to be sent further on and returned in that way. As the train was approaching the next station, which was a small and unimportant station, five miles east of Morehouse, called Julietta, the conductor came to Mrs. Eaton and, taking her satchel, told her that she would have to get off there, where she would find a buggy ready to take her back to Morehouse. When the train stopped at Julietta, she followed the conductor out on to the platform, where he left her in charge of the station agent. After the train had left, she ascertained, upon inquiry, that no conveyance had been provided for sending her back to Morehouse, and that no conveyance could be procured for that or any similar purpose, at or near Julietta station. Wishing, in any event, to proceed directly to the house of Graham, her brother-in-law, which was five miles distant across the country from Julietta, and not to return immediately to Morehouse, she left the station at which she had been so left on foot and walked the entire distance to Graham's house, leaving the former place perhaps before seven o'clock in the evening, and arriving at the latter place at nine o'clock at night.

This action was prosecuted by Mrs. Eaton against the railroad company, to recover damages for being carried beyond Morehouse, and being compelled to walk so great a distance to reach Graham's house. After evidence had been introduced at the trial at special term, establishing, or tending to establish the facts herein above stated, the plaintiff offered to prove: *First*—That the weather was hot and sultry during the afternoon and evening of the 12th day of July, 1881. *Second*—That it took her nearly, or quite, three hours to walk from Julietta to Graham's house. *Third*—That the road she had to walk over was very dusty. *Fourth*—That in walking from Julietta to Graham's house, she had to cross a creek at one place and a bayou at another place. *Fifth*—That in crossing the creek, by the only practical method which the situation afforded, she got her clothing and feet wet, and that in crossing the bayou she had to carry rails and make a temporary walkway, suffering there, also, further injuries from mud and water. *Sixth*—That a part of the road passed through a dark strip of

woods. *Seventh*—That she was sick when she arrived at Graham's house, and so continued for several days immediately thereafter. *Eighth*—That her sickness resulted from the labor of walking, supplemented by worry of mind, fright, and the hot weather. *Ninth*—That in passing a house on the road to Graham's house, she was attacked and chased by two dogs, and in that way badly frightened. But the court refused to permit the plaintiff to make proof of the facts thus severally proposed to be proven, and the various rulings upon the exclusion of these facts were afterwards assigned as a cause for a new trial.

The trial at special term resulted in a verdict and judgment for the defendant. Upon an appeal to the general term the judgment at special term was reversed, the court holding that the judge at special term had ruled correctly in excluding the offered evidence as to the plaintiff's injuries from crossing the creek and bayou, as to her being attacked and chased by dogs, and as to her sickness claimed to have resulted from the incidents of her journey from Julietta to the house of her brother-in-law, but had erred in the exclusion of all the other items of rejected evidence, and it is from that judgment of reversal that this appeal is prosecuted.

The question as to what may be taken into consideration in the assessment of damages in a case like this is one which has provoked much discussion, and concerning which the text-writers have been unable to formulate any general rule of easy application in all cases of the class to which this belongs. As bearing on the general subject there are many conflicting decisions, and in some cases sharp differences have been manifested between judges of the same court as to the conclusions which have been reached by a majority of their number.

A narrower limit is applied in the assessment of damages for a breach of contract, pure and simple, than is prescribed in an action for a tort, and, in our judgment, much of the conflict between decided cases and the individual views of judges, to which we have referred, has resulted from a failure to carefully observe that distinction between the two classes of damages. Two of the cases cited by counsel will serve to illustrate our meaning in this respect. One is the case of *Hobbs v. London, etc., Ry. Co.*, 11 Moak Eng. R. 181; and the other is *Pullman Palace Car Co. v. Barker*, 4 Col. 344. These cases were both treated as, and decided upon the theory that they were, actions for a breach of contract merely, when in truth they were both actions for a neglect of duty by a common carrier from which an injury resulted to a passenger, and hence were, in all their essential features, actions for tortious misconduct on the part of the defendants.

Counsel for the appellant contend for the application of the doctrine of these and other kindred cases to the case at bar, upon the like theory that it is only an action for the breach of a con-

tract for transportation, entered into between the parties, and, consequently, an action in which the narrower limit ought to be applied in the assessment of the damages. It is true that the appellee entered the appellant's train of cars at Indianapolis, under an implied contract for her transportation to Morehouse, but when the appellant carried the appellee beyond Morehouse, against her will, it ceased to carry her as a passenger for hire, and became a wrong-doer, responsible for whatever injury or inconvenience, if any, which might result to her from being thus carried beyond her place of destination.

Thompson on Carriers of Passengers, p. 568, says: "The refusal of the carrier to receive a passenger, carrying him beyond his destination, detaining him unnecessarily during his journey, or carrying off a person against his will who is legitimately upon a vessel, are all wrongs which may be redressed by actions for damages thereby sustained." And this statement of general legal propositions is well supported in reason, as well as by the authorities cited by the author. Therefore, the essential facts relied upon for a recovery in this action constituted a tort, concerning which a wider range of inquiry was permissible than in an ordinary action for the simple breach of a contract. *Heirn v. McCaughan*, 32 Miss. 17; *The Canadian*, 1 Brown, Adm. R. 11; *Stoneseifer v. Sheble*, 31 Mo. 243; *Thompson v. New Orleans, etc., R. R. Co.*, 50 Miss. 315; *Burnham v. Grand Trunk Ry. Co.*, 63 Me. 298.

Thompson on Negligence lays down the following general rule on the subject of consequential damages: "Whoever does a wrongful act is answerable for all the consequences that may ensue in the ordinary and natural course of events, though such consequences be immediately and directly brought about by intervening causes, if such intervening causes were set in motion by the original wrong-doer." 2 Thomp. Neg. 1084; Add. Torts, 5; *Baltimore, etc., R. R. Co. v. Reaney*, 42 Md. 117.

In the case of *Jones v. Boyce*, 1 Stark. 402, Lord Ellenborough said: "If I place a man in such a situation that he must adopt a perilous alternative, I am responsible for the consequences."

In the case of *Brown v. Chicago, etc., Ry. Co.*, 54 Wis. 342; s. c. 3 Am. & Eng. R. R. Cas. 444, the facts, briefly stated, were that Brown and wife, and a seven year old child, took passage on the railway to a place called Manston; that before reaching Manston, and at a place three miles east of that place, Brown and wife were told by a brakeman that they were then at Manston, and to leave the train, which they accordingly did; that it was then night; that it had rained the day before, and was still cloudy; that, ascertaining that they were not at Manston, and seeing no house at which they could take shelter, Brown, with his wife and child, walked on in the direction of Manston, arriving there late at night; that Mrs. Brown was, at the time, *enceinte*, and was very much

exhausted by the walk; that she soon afterward became dangerously sick, and had a miscarriage, all resulting from the exertion she had made in walking. After an elaborate review of numerous authorities having a bearing on the question involved, including the cases of *Hobbs v. London, etc., Ry. Co., supra*, and *Pullman Palace Car Co. v. Barker, supra*, which were disapproved, the court held that the railway company was liable to Mrs. Brown for the injuries she received from her enforced walk to Manston.

That case was, perhaps, a stronger one against the railway company, in some respects, than the one at bar, but the general principles announced, as decisive of that case, have a practical application to the facts of this case, and are entitled, as we believe, to the favorable consideration of this court.

The court in that case, after referring to what had been announced as a correct legal proposition in another case, continued: "So, in the case at bar, the defendant, by its negligence, placed the plaintiffs in a position where it was necessary for them to act to avoid the consequences of the wrongful act of the defendant, and, acting with ordinary prudence and care to get themselves out of the difficulty in which they had been placed, they sustained injury. Such injury can be, and is, traced directly to the defendant's negligence as its cause; and it is its proximate cause, within the rules of law upon that subject."

It is due, however, to the importance of the subject to state that the opinion in that case was promulgated by a majority vote only, two of the judges dissenting, and for that reason we would not quote from it with approbation if we were not fully satisfied that the conclusion reached was substantially a correct conclusion upon the facts as we find them reported. The case is, at all events, one of interest because of its grouping together of, and its comments upon, a great number of cases having relation to the general subject of the liability of common carriers of passengers.

When the appellant set the appellee down at Julietta, it did so at the peril of having to respond in damages for whatever injury, if any, she had already sustained, or might thereafter sustain, by being carried out of her way on the journey she started out to make, and placed her in a position in which she was required to do whatever was necessary to extricate herself from the consequences of the wrong which had been inflicted upon her.

If, therefore, without being able to procure a conveyance, and acting with prudence and care, the appellee proceeded on foot to complete her journey, and thereby, and as incidental thereto, received injuries, and incurred vexatious annoyances, she became entitled to have those injuries and annoyances taken into consideration in estimating her damages in the event of a verdict in her favor.

Some of the facts which the appellee proposed, but was not

permitted to prove, might not have been of much value as evidence, but, as incidents connected with the appellee's journey, they were all facts which, we think, ought to have been admitted in evidence for the consideration of the jury. If the dogs which attacked and chased the appellee had bitten or otherwise physically injured her while on the way, that would doubtless have constituted a distinct and disconnected injury, for which the appellant would not have been responsible, but the fright and peril, which she proposed to prove were occasioned by the dogs, amounted only to annoyances incidental to the walk which, it is assumed, the appellee was constrained to make, and hence stand upon different grounds.

The conclusion we have reached in this case is supported, either directly or indirectly, by the following cases: *Billman v. Indianapolis, etc., R. R. Co.*, 76 Ind. 166; s. c. 6 Am. & Eng. R. R. Cas. 401; *Binford v. Johnston*, 82 Ind. 426; *Williams v. Vanderbilt*, 28 N. Y. 217; *Eten v. Luyster*, 60 N. Y. 252; *Allison v. Chandler*, 11 Mich. 542; *Hill v. Winsor*, 118 Mass., 251; *Lake Erie, etc., R. W. Co. v. Fix*, 88 Ind., 381; s. c. 11 Am. & Eng. R. R. Cas. 109.

The judgment of the court below at general term is affirmed, with costs.

Transportation of Passenger Beyond Destination.—Where a party purchases a ticket to a certain destination, and, without fault on his part, is carried past such destination by the train, he is ordinarily entitled to damages. *Hobbs v. London & S. W. R. Co.*, L. R., 10 Q. B. 111; *New Orleans, J. & Gt. N. R. Co. v. Hurst*, 36 Miss. 660; *Mobile & Ohio R. R. Co. v. McArthur*, 43 Miss. 180; *Southern R. R. Co. v. Hendricks et al.*, 40 Miss. 375; *New Orleans, J. & Gt. N. R. R. Co. v. Statham*, 42 Miss. 607; *Thompson v. New Orleans, J. & Gt. N. R. R. Co.*, 50 Miss., 315; *Ohio & Mississippi R. R. Co. v. Hatton*, 16 Ind. 12; *Porter v. The New England*, 17 Mo. 290; *Columbus & Indianapolis Central R. Co. v. Farrell*, 81 Ind. 408; *Baltimore, P. & C. R. Co. v. Pixley et ux*, 61 Ind. 22; *Lake Shore & M. S. R. R. Co. v. Pierce*, 3 Am. & Eng. R. R. Cas. 340.

Measure of Damages.—A passenger thus carried past his destination is entitled to recover damages for the trouble and inconvenience occasioned him by the loss of time and the necessary additional expense incurred by him getting back to the point past which he has been carried. He can only recover, however, for injuries which are the direct consequence of the act of the company. *Baltimore, P. & C. R. R. Co. v. Pixley*, 61 Ind. 22; *Ward v. Vanderbilt*, 4 Abb., N. Y. Ct. of App. Dec. 521; *Indianapolis, B. & W. R. Co. v. Birney*, 71 Ill. 391; *Southern R. R. Co. v. Hendricks et al.*, 40 Miss. 375; *Thompson v. New Orleans, J. & Gt. N. R. Co.*, 50 Miss. 315; *Fink v. Albany & Susq. R. R. Co.*, 4 Lans. 147; *Chicago, St. L. & N. O. R. R. Co. v. Scurr*, 6 Am. & Eng. R. R. Cas. 341; *Smith v. Steam Packet Co.*, 86 N. Y. 408; *Trigg v. St. Louis, etc., R. Co.*, 6 Am. & Eng. R. R. Cas. 345; *Dawson v. Louisville N. R. Co.*, 11 Am. & Eng. R. R. Cas. 134; *St. Louis, K. C. & N. R. Co. v. Marshall*, *supra*.

Damages for Illness.—If the party is sick, and, being turned off the train at a point beyond his destination, is forced to walk some distance, and thereby increases or aggravates his ailment, he is entitled to recover damages. *Heirn v. McCaughan et ux*, 32 Miss. 17; *New Orleans, J. & Gt. N. R. R. Co. v. Statham*, 42 Miss. 607; *Mobile & Ohio R. R. Co. v. McArthur*, 43 Miss. 180; *Brown et ux v. Chicago, etc., R. Co.*, 54 Wisc. 342; s. c. 3 Am. & Eng. R. R. Cas. 444; *Lake Erie & W. R. Co. v. Fire*, 11 Am. & Eng. R. R. Cas. 109.

But a party cannot, by electing to walk a long distance, in consequence of which he is made ill, hold the company liable for such a result. *Indianapolis, B. & W. R. R. Co. v. Birney*, 71 Ill. 391; *Hobbs v. London & S. W. R. R. Co., L. R.*, 10 Q. B. 111; *Cleveland, etc., R. R. Co. v. Newell*, 8 Am. & Eng. R. R. Cas. 374.

Nor can he recover for any other injuries which are not the proximate result of the act of the company's servants. *Lewis v. Flint & Pere Marquette R. R. Co.*, and note, *supra*.

McCLeLLAND, Adm'r

v.

LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY CO.

(94 *Indiana Reports*, 276.)

Error in sustaining a demurrer to a paragraph of a pleading is harmless, where the facts alleged therein are contained in a remaining paragraph.

It is too late to ask leave to dismiss an action after the jury trying the same has retired to consult upon their verdict.

A trial court may rightfully correct an erroneous instruction, upon the return of the jury into court requesting that the instructions again be read to them.

A drunken passenger upon a railway train was, owing solely to his condition, carried past his destination, and then, failing to comprehend his liability to pay further fare or to get off the train, he was removed lawfully from the train by the conductor and assistants, and placed a short distance from the track. Subsequently, he wandered upon the track, where he was run over and killed by another train at a point where those in charge of the latter train did not and could not see him in time to prevent the accident.

Held, that the railway company was not liable for his death, and was not chargeable with notice of his condition or whereabouts.

FROM the Monroe Circuit Court.

M. F. Dunn and *G. G. Dunn*, for appellant.

G. W. Friedley and *E. D. Pearson*, for appellee.

FRANKLIN, C.—This is a suit by appellant, as administrator of the estate of Isaac Brimmer, against appellee, for the death of said Brimmer.

The complaint consists of seven paragraphs. A demurrer was sustained to the fourth and overruled as to the others. Issues were formed in the Lawrence Circuit Court, when the venue was changed to the Monroe Circuit Court, where a trial was had by jury, and a verdict was returned in favor of the defendant. A motion for a new trial was overruled and judgment rendered upon the verdict.

The errors assigned are the sustaining of the demurrer to the fourth paragraph of the complaint, the overruling of the motion for a new trial, and the overruling of appellant's motion to dismiss his cause of action.

It is unnecessary to copy the lengthy fourth paragraph of the complaint in this opinion. There could be no available error in

sustaining the demurrer to it, for the reason that all the material facts that could have been proved under it were provable under the other paragraphs of the complaint, to which the demurrer was overruled; and appellant could not be injured by the sustaining of the demurrer to that paragraph.

The facts in this case, as shown by the record, are as follows: The deceased got on a passenger train on defendant's road at Campbellsburg and paid his fare to Mitchell. When the train arrived at Mitchell it stopped, and the usual announcement of the station was made, but the deceased did not get off. In a short time it moved on with the deceased in his seat; when it had gone a short distance, a mile or over, the conductor of the train discovered that he was yet upon the train and went to him and discovered that he was drunk and in a stupefied condition; he aroused him up and asked him where he wanted to go, to which deceased made no reply; he then told him what the fare was to the next station, if he wanted to go any further, to which the deceased still made no reply, but only laughed at the conductor, not appearing to comprehend the situation.

The conductor stopped the train, and he and the brakeman led the deceased off of the train, and set him down on the grass some feet to one side of the road, and left him there sitting up. In a short time afterward a freight train on the defendant's road, which the passenger train had passed at Mitchell while standing on the side-track, came along, following the passenger train. The deceased, in the meantime, had got upon the track of the road and was lying down on it. When he was discovered by the engineer of the freight train, in that condition, distinct enough to distinguish that the object was some person, he then blew the whistle, and those in charge of the freight train endeavored to stop it, but it was too late; the train ran upon the deceased and killed him.

The motion for a new trial contains nine reasons. The first three are in relation to the sufficiency of the evidence. All the others are in relation to the instructions, except the ninth, which is for overruling the motion to dismiss.

Appellant in his brief makes no special point upon the sufficiency of the evidence otherwise than as mixed up with his discussion of the general tenor of the instructions. And he makes this general proposition, covering the theory of the instructions asked by him and refused to be given, in contradistinction to those given by the court: That the conductor and managers of the passenger train, at the time they left the deceased by the side of the road, well knew his helpless condition; that their knowledge of his condition was notice of that fact to the defendant, as a corporation, and all its employés; hence the employés in charge of the freight train at the time they left Mitchell were chargeable with notice of the position and condition of the deceased, and should

have run careful enough to have stopped the train before it reached the deceased. Notwithstanding the appellant's extended argument upon this proposition, we cannot see any good reason for its maintenance. Notice is not to be presumed where the facts show that it was impossible for it to exist by any human agencies, unless the law expressly makes it so. And we know of no principle of law that will charge the managers of the freight train with notice that the deceased had got upon the track, before they saw him there, or had any information of his being there, and that required them to run slow enough to stop before they reached him. We see no negligence in the managers of the freight train that would justify the giving of the instructions asked.

Under the circumstances, the conductor of the passenger train had the right to put deceased off the train, and place him far enough to one side so as to be out of danger from passing trains, without some intervening agency. The conductor could not be expected or required to place a guard over him to prevent his getting upon the track; and his afterward getting upon the track, and lying down there, could not be the natural and necessary or usual result of his having been left by the side of the road, or his death the proximate result of his having been so left. He was bound to be left on one side or the other of the road, and if he afterward wandered upon the track it was his own folly, resulting from his unfortunate condition, for which the defendant ought not to be held responsible. The instructions asked and refused, and those given, are too long and numerous to copy in this opinion.

We think the instructions given fully and fairly presented to the jury the law as applicable to the case. And as to the instructions asked and refused, what were correctly asked were substantially given by the court either in its own instructions, or the ones given of those that were asked, and there was no error in refusing to give those which were incorrect.

There is a bill of exceptions in the record showing that after the cause had been submitted to the jury, and they had retired to deliberate upon their verdict, they again returned into court and asked to have the instructions again read to them, which was done by the court; that during the reading the court materially modified and changed instruction No. 22, and ordered the jury to again retire to consider of their verdict. The jury were directed to retire from the room, and, when absent, the plaintiff moved the court for leave to dismiss his cause of action, and asked leave to take a nonsuit, to which the defendant objected, and the court overruled the motion, which ruling is complained of as a last reason for a new trial.

As to a modification and change of the instruction, the record nowhere shows what it was. Whether the instruction No. 22 asked by the defendant and given by the court, as it appears in

the record, is in its modified and changed form, or as originally given, we cannot tell. Considering it in its recorded form, we see no error in it. But no complaint is made as to the correctness of the modification; the objection is only as to the fact of a change. It is not error to correct an instruction.

As to the overruling of the motion to dismiss: The 333d section of R. S. 1881 provides that the plaintiff may dismiss his action any time before the jury retires. And in all other cases the decision must be upon its merits. See the cases of *Dunning v. Galloway*, 47 Ind. 182, and *Holland v. Johnson*, 51 Ind. 346.

In this case the cause had been submitted to the jury, and they had retired to consider of their verdict before the plaintiff moved for leave to dismiss his cause or take a nonsuit; and it makes no difference if the jury had returned and heard the instruction re-read; after the jury had retired a second time to deliberate upon their verdict, under the above statute, the defendant had a right to insist upon a verdict on the merits of the cause, and there was no error in overruling plaintiff's motion to dismiss, nor in overruling the motion for a new trial. The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be and it is in all things affirmed with costs.

Analogous Case.—See *Lewis v. Flint & Pere Marquette R. R. Co.*, and note, *infra*.

LEWIS

v.

FLINT & PERE MARQUETTE RAILWAY COMPANY.

(*Advance Case, Michigan, June 11, 1884.*)

In an action for an injury, evidence of the neglect of any precaution by the plaintiff can only raise a question of contributory negligence for the jury.

Damages cannot be recovered for purely accidental injuries.

A railway passenger was carried a little past his station on a dark night, and on leaving the train was misinformed by the conductor as to where he was. He soon discovered that he was south of a cross-road he had meant to take in going home, instead of north of it, as he was told when he landed. He knew the neighborhood, and knew that where the road crossed the track there were cattle-guards and culverts on both sides of it. If he had landed where he was told he was, he would have followed the track south to the road and picked his way across the culvert, though he might have shunned it by taking a side path. In approaching the road from the south he determined to cross the other culvert in the same way, and it is not clear that on that side of the road he could have done any better. But when he neared the cattle-guard his eyes deceived him and his foot slipped, and in trying to regain his balance he fell into the culvert, which he supposed was further

off, and he was seriously hurt. *Held*, that the company's negligence in carrying him past the station and in misinforming him was not the proximate cause of the injury, which was purely accidental, and he could not recover for it.

In an action for injury the court cannot go back of the proximate cause, and as between other causes preceding that select one, rather than another upon which to permit a recovery.

ERROR to Wayne county.

Case. Plaintiff brings error. Affirmed.

Blodget & Patchin and *C. I. Walker*, for plaintiff appellant.

The rule as to proximate damages is more liberal in cases of tort than of contract; *Sherm. & Redf. on Neg.*, Sec. 597; *Sedg. on Damages* (79) 89 and note; *Field on Damages*, Sec. 660; *Thompson on Carriers*; pp. 545-6; *Bowers v. Pioneer Co.*, 2 Sawy. 301; it is enough that an injury appears to have been a natural and probable consequence of the wrong, whether foreseen or not. *Whart. on Neg.*, Secs. 4, 16, 17, 74-78, 191, 192; 2 *Thomp. Neg.*, 1084; *Hill v. Windsor*, 118 Mass. 251; *Higgins v. Dana*, 107 Mass. 495; *Eton v. Luyster*, 60 N. Y. 257; *Smith v. Lond. & S. W. Ry. Co.*, L. R. 6 C. P. 201; *Vandenburgh v. Truax*, 4 Den. 464; and where there is any doubt as to the facts or the inferences the question is for the jury. 2 *Thomp. Neg.*, 1107; *Powell v. Salisbury*, 2 Y. & J. 389; *Kellogg v. Mil. & St. Paul Ry.*, 5 Dill. 541; *Sexton v. Bacon*, 31 Vt. 540; *Lane v. Atlantic Works*, 111 Mass. 140; *Stark v. Lancaster*, 57 N. H. 420; *Willey v. Belfast*, 61 Me. 576; *Lake v. Millihan*, 62 Me. 241; *Smith v. B. & N. A. Co.*, 86 N. Y. 412; *Scott v. Hunter*, 46 Pa. St. 192; *Pennsylvania R. R. Co. v. Hope*, 80 Pa. St. 373; *T., P. & W. R. R. Co. v. Pinker*, 53 Ill. 547; *Patten v. C. & N. W. Ry.*, 32 Wis. 524; *Clemens v. H. & St. J. R. R. Co.*, 53 Mo. 370; *Savage v. C. & St. P. R. R. Co.*, 18 N. W. Rep. 272.

Wisner & Draper and *William M. Webber*, for defendant.

The direct cause of an injury is for the court to determine after all the facts and inferences have been left to the jury. *Brown v. Congress & Baker St. Ry.*, 49 Mich. 153; *G. R. & I. R. R. Co. v. Judson*, 34 Mich. 507; *Metropolitan Ry. v. Jackson*, H. L. 3 App. Cas. 193; 24 Moak, 121; when voluntary action intervenes between an incident and an injury resulting from the voluntary action, the incident is not the direct cause of the injury, even if it occasioned the voluntary action. *Blake v. Newfield*, 68 Me. 365; *Hyde v. Jamaica*, 27 Vt. 458; *Tron v. Vt. Cent. R. R.*, 24 Vt. 494; *People v. Rockwell*, 39 Mich. 503; *Mich. Cent. R. R. v. Burrows*, 33 Mich. 6; *Morrison v. Davis*, 20 Pa. St. 436; *Flower v. Adam*, 2 Taunt. 314; *Marble v. Worcester*, 4 Gray, 395; *Stiles v. A. & W. P. R. R.*, 65 Ga. 370; 8 Am. & Eng. R. R. Cas. 195; As to "proximate cause" and "remote damages," see 13 Am. L. Reg. 14; *Rigby v. Hewitt*, 5 Exch. 240; *McGrew v. Stone*, 53 Pa. St. 436; *Scott v. Hunter*, 46 Pa. St. 192; *Atchison, etc., R. R.*

Co. v. Stanford, 12 Kan. 354; Proctor v. Jennings, 6 Nev. 83; Doggett v. Richmond, etc., R. R. Co., 78 N. C. 305; Phillips v. Dickerson, 35 Ill. 11; Hoag v. L. S. & M. S. Ry., 4 Norris, 293; 5 Rep. 81; Wood v. L. S. & M. S. Ry., 49 Mich. 370; Lancaster v. Kessinger, 12 Rep. 636.

COOLEY, C. J.—Action to recover damages for a personal injury. The facts as they appeared on the trial were as follows:

The plaintiff resides in the township of Huron, a few miles east of Belden station on the road of defendant. He was at Wayne station on the evening of January 12, 1883, awaiting the train which was to go south past Belden in the night. The train left Wayne at 3:05 in the morning of the 13th, and he procured his ticket and took passage for Belden, where the train was due at 3:30. The night was dark, cold and wet. The train stopped when "Belden" was called and plaintiff got off. Belden was only a flag station for this train, and there was no one in charge of the station house, and no light there. When plaintiff got off the train he was told by the brakeman or conductor that they had run by the station about two car-lengths, and he replied that if that was all it was no matter, as he had to go that way. An east and west highway crosses the railroad about twenty-four rods south of the station house, which the plaintiff would take in going to his home. If he was two car-lengths beyond the station house, he would still be north of the highway; and supposing that to be the case, he followed the track along south, in preference to going back to the station house from which a passage east of the track would have led him to the highway. The plaintiff knew the place well, and knew that on the track he must cross an open cattle-guard to reach the highway. He had crossed this before, and sometimes found a plank laid over it. Passing on he soon came to trees which he knew were some distance south of the highway, and he then knew the information given him, as to where he was when he alighted from the train, was erroneous. He turned about to retrace his steps, and followed the track in the direction of the highway. This he did carefully, because it was very dark, and he knew there was an open cattle-guard on the south side of the highway, as well as on the north side. He was looking for this cattle-guard constantly and carefully. There were burning kilns near to the track on his right, and the smoke from these affected his eyes, but he saw a switch light, which he knew was near the crossing, but which, at the same time, was too dim to aid him. He continued to approach the cattle-guard carefully, intending, if there was a timber or plank over it, to cross upon that; and if not, then to pass down into it, and climb out. In the dim light he saw what he believed to be the cattle-guard, which seemed to be several paces off, but at the very next step one foot slipped, and as he at-

tempted to save himself by springing upon the other, the other foot caught, and he was precipitated into the cattle-guard, and received an injury of a very serious and permanent nature. He was for a time senseless, but then succeeded in drawing himself out by his elbows—not being able to use his lower limbs—and with great difficulty he reached a neighboring tavern, where he was cared for.

On the trial claim was made, on the part of the defence, that the plaintiff was negligent in following the railroad track back to the cattle-guard and in attempting to cross it; and evidence was given to show that he would have encountered no impediments. But in such a night as this was, it is not clear that the field would have afforded a safer passage than the highway; and his failure to take it would at most only raise a question of negligence on his part which would necessarily go to the jury. *Detroit, etc., R. R. Co. v. Van Steinburg*, 17 Mich. 118; *Billings v. Breining*, 45 Mich. 72; *Chicago, etc., R. R. Co. v. Miller*, 46 Mich. 537; *Marcott v. Marquette, etc., R. Co.*, 47 Mich. 7; s. c. 8 Am. & Eng. R. R. Cas. 306. In this case the court took the case from the jury, and directed a verdict for the defendant.

This direction is understood to have been given on the ground that the injury which the plaintiff suffered was not proximate to the wrong attributable to the defendant, and for that reason would not support an action.

The wrong of the defendant consisted in carrying the plaintiff past the station, and then giving him erroneous information as to where he was. If the injury suffered was not a proximate consequence of this wrong, the instruction of the court was right; otherwise not. The difficulty here is in determining what is and what is not a proximate consequence in contemplation of law.

For the plaintiff the cases are cited in which it has been held that one whose negligence causes a fire by the spreading of which the property of another is destroyed, is liable for the damages, though the property for which the compensation was claimed was only reached by the fire after it had passed through intervening fields or buildings. *Kellogg v. V. C. & N. W. R. Co.*, 26 Wis. 223; *Fent v. Toledo, etc., R. R. Co.*, 59 Ill. 349; *Wiley v. West Jersey R. Co.*, 44 N. J. 248; *Milwaukee, etc., R. Co. v. Kellogg*, 94 U. S. 469. But these cases, we think, are not analogous to the one before us. The negligent fire was the direct and sole cause of the injury in each instance, and there was no intervening cause whatever. The cases are in harmony with *Hoyt v. Jeffers*, 30 Mich. 181. The case of *Pennsylvania v. Hoagland*, 78 Ind. 203, s. c. 3 Am. & Eng. R. R. Cas. 406, seems at first view to be more in point. The action in that case was brought by a woman, who, in consequence of misinformation on the part of the person in charge of a railroad train, left the car in the night time at the wrong stopping-place, and wandered about for an hour or more before

she could find shelter, taking cold from exposure. But here, as in the other cases cited, there was no cause intervening the wrong complained of and the resulting injury, and the question of proximate cause does not appear to have been raised in the case. *Smith v. Steam Packet Co.*, 86 N. Y. 408, is also relied upon, but it is unlike this in the important particular that the intervening cause which, after the first wrong on the part of the defendant, operated to bring injury to the plaintiff, was a neglect of proper care, which the court held was due from the defendant to the plaintiff under the circumstances, so that all the injury received was a proximate result of the defendant's neglect of duty.

The case of *Brown and wife v. Chicago, etc., R. Co.* 54 Wis. 342, more nearly resembles the present case than any other to which our attention has been called by counsel for the plaintiff. The facts, as stated in the prevailing opinion, are the following: The plaintiffs, with their child, seven years old, were being carried on defendant's cars, with Manston for their destination, and when they arrived at a station three miles east of Manston, they left the train under the direction of the brakeman, who told them they were at Manston. It was in the night; it was cloudy and wet; there was a freight train standing on a side track where they were put off the train; there was no platform, and no lights visible except on the freight train. Plaintiffs soon ascertained they were not at Manston, but did not know where they were. They did not see the station house, though there was one, hidden from their view by the freight train. They supposed they were at a place two miles east, where the train sometimes stopped, but where there was no station house. They started west on the track towards Manston, expecting to find a house where they might stop, but did not find one until they came to a bridge within a mile of Manston, and then they thought it easier to go on to that place than to seek shelter at the house, which was a considerable distance from the track. Mrs. Brown was pregnant at the time, and when she arrived at Manston, was quite exhausted. She had during the night severe pains, which continued from time to time, and were followed by flowing, and at length by a miscarriage, inflammation and serious illness. The plaintiffs claimed that the miscarriage and subsequent sickness were all caused by the walk Mrs. Brown was compelled to take to get from the place where they were left by the train to Manston; and the question in the case was whether the defendant was liable for the injury to Mrs. Brown, admitting it to have been caused by her walk. The majority of the court—finding that “there was no intervening independent cause of the injury, other than the act of the defendant,” and that “all the acts done by the plaintiffs, and from which the injury flowed, were rightful on their part, and compelled by the act of the defendant”—held that “the injury to Mrs. Brown was the direct result of the

defendant's negligence, and that such negligence was the proximate and not the remote cause of the injury," quoting Lord Ellenborough in *Jones v. Boyce*, 1 Stark. 493: "If I place a man in such a situation that he must adopt a perilous alternative, I am responsible for the consequences."

The case of *Pullman Palace Car Co. v. Barker*, 4 Col. 344, is opposed to the case in Wisconsin; as are also *Hobbs v. London & S. W. R. Co.*, L. R. 10 Q. B. 111; and *Francis v. St. Louis Transfer Co.*, 5 Mo. App. 7; but it is not necessary to express any opinion upon the conflict which these cases disclose, because in the case before us there was an independent cause intervening the fault of the defendant and the injury the plaintiff sustained, and from which the injury resulted as a direct and immediate consequence.

To show what is understood by intervening cause, it may be useful to refer to a few cases. *Livie v. Janson*, 12 East. 648, was a case of insurance on a ship warranted free of American condemnation. In sailing out of New York she was damaged by perils of the sea, stranded and wrecked on Governor's Island, and then seized and condemned. It was the peril of the sea that caused the vessel to be seized and condemned; but as the condemnation was the proximate cause of the loss, the insurers were held not liable. A similar case is *Delano v. Insurance Co.*, 10 Mass. 354, where a like result was reached.

In *Tisdale v. Norton*, 8 Met. 383, the facts were that a highway was defective, and the plaintiff, who was using it, went out of it into the adjoining field, where he sustained an injury. He brought suit against the town, whose duty it was to keep the highway in repair. But the court held that only as a remote cause could the injury of the plaintiff be said to be due to the defect in the highway. The proximate, not the remote, cause is that which is referred to in the statute which gives an action against the town; and the proximate cause in this case was outside the highway, not within it.

In *Anthony v. Slaid*, 11 Met. 290, the plaintiff, who was contractor with a town to support for a specified time and for a fixed sum all the town paupers in sickness and in health, brought suit against one who, it was alleged, had assaulted and beaten one of the paupers, as a consequence of which the plaintiff was put to increased expense for care and support; but the action was held not maintainable.

In *Silver v. Frazier*, 3 Allen 382, it was decided that a principal whose agent has disobeyed his instructions, induced to do so by the false representations of a third party, cannot maintain an action against such third party for the damage sustained. Said Bigelow, Ch. J.: "The alleged loss or injury suffered by the plaintiff is not the direct and immediate result of the defendant's

wrongful act. Stripped of its technical language the declaration charges only that the agent employed by the plaintiff to do a certain piece of work disobeyed the orders of his principal, and was induced to do so by the false statements of the defendant. In other words the plaintiff alleges that his agent violated his duty and thereby did him an injury, and seeks to recover damages therefor by an action against a third person, on the ground that he induced the agent by false statements to go contrary to the orders of his principal. Such an action is, we believe, without precedent. The immediate cause of injury and loss to the plaintiff is the breach of duty of his agent. This is the proximate cause of damage. The motives of inducement which operated to cause the agent to do an unauthorized act are too remote to afford a good cause of action to the plaintiff."

In *Dubuque Wood and Coal Association v. Dubuque*, 30 Iowa 176, the facts were that the plaintiff had a quantity of wood deposited at one end of a bridge which was to be taken over the bridge into the city of Dubuque. The bridge was out of repair, and while awaiting repair by the city whose duty it was, the wood was carried away by a flood. The plaintiff sued the city for the value of his wood, but it was held he could not recover. Beck, J., in deciding the case, illustrates the principle as follows: "An owner of lumber deposited upon the levee of the city of Dubuque, exposed to the floods of the river, starts with his team to remove it. A bridge built by the city, which he attempts to cross, from defects therein falls, and his horses are killed. By the breaking of the bridge and the loss of his team he is delayed in moving his property. On account of this delay his lumber is carried away by the flood and lost. The proximate consequence of the negligence of the city is the loss of his horses. The secondary consequence, resulting from the first consequence, is the delay in removing the lumber, which finally caused its loss. Damage on account of the first is recoverable, but for the second is denied."

Similar to this are *Daniels v. Ballantine*, 23 Ohio St. 532; s. c. 13 Am. Rep. 264, and *McClary v. Sioux City, etc., R. R. Co.*, 3 Neb. 44. In each of these cases the negligence of the defendant left the property of the plaintiff where by an act of God—in one case a flood and in the other a tornado—it was lost or injured, and in each the act of God and not the negligence was held to be the proximate cause of injury.

In *Scheffer v. Railroad Co.*, 105 U. S. 249, s. c. 8 Am. & Eng. R. R. Cas. 59, it appeared that by a collision of railroad trains a passenger was injured, and becoming thereby disordered in mind and body, he, some eight months thereafter, committed suicide. Action was brought against the railroad company as the negligent cause of his death. Miller, J., speaking for the court, and referring to *Insurance Co. v. Tweed*, 7 Wall. 44, and *Milwaukee, etc.,*

R. R. Co. v. Kellogg, 94 U. S. 469, said: "The proximate cause of the death of Scheffer was his own act of self-destruction. It was, within the rule in both these cases, a new cause and a sufficient cause of death. The argument is not sound which seeks to trace this immediate cause of death through the previous stages of mental aberration, physical suffering and eight months' disease and medical treatment, to the original accident on the railroad."

In *Bosch v. Burlington, etc., R. R. Co.*, 44 Iowa, 402, the plaintiff's house took fire, and the fire department, because, as was alleged, of the wrongful occupation and expansion of the river bank, were unable to get to the river to obtain water for putting out the fire. Plaintiff sued the defendant for the loss of his property, but the court said the acts of defendant complained of "have no connection with the fire, nor with the hose or other apparatus of the fire companies. They are independent acts, and their influence in the destruction of plaintiff's property is too remote to be made the basis of recovery."

In this last case, *Metallic Compression Co. v. Railroad Co.*, 109 Mass. 277; s. c. 12 Am. Rep. 689, was referred to and distinguished. The facts there were that the plaintiff's building was on fire, and water was being thrown upon it through hose, when an engine of defendant was recklessly run upon the hose and severed it, thereby defeating the efforts to extinguish the fire which otherwise were likely to succeed. In that case the relation of the plaintiff's injury to the defendant's act was direct and immediate. So it was also in *Billman v. Indianapolis, etc., R. R. Co.*, 78 Ind., 168; *Lane v. Atlantic Works*, 111 Mass., 136; and *Ricker v. Freeman*, 50 N. H., 420, all of which are ruled by the *Squib* case (*Scott v. Shepherd*, 2 W. Bl. 892), and so perhaps are *Fairbanks v. Kerr*, 70 Penn. St. 90; and *Lake v. Milliken*, 62 Me., 240.

In *Henry v. St. Louis, etc., R. R. Co.*, 76 Mo., 288, s. c. 12 Am. & Eng. R. R. Cas. 136, it appeared that the plaintiff was wrongfully commanded to get off a caboose of the defendant where he had a right to be. He obeyed the command, and while upon the ground stepped upon a track where he was run upon and injured by a train. Hough, J., speaking for the court, said: "It is, perhaps, probable that if the plaintiff had not been ordered out of the caboose, he would not have been injured, but this hypothesis does not establish the legal relation of cause and effect between the expulsion and the injury. If the plaintiff had not left home, he certainly would not have been injured as he was, but his leaving home could not therefore be declared to be the cause of his injury. As the plaintiff's injury was neither the ordinary, natural nor probable consequence of his expulsion from the caboose, such expulsion, however it might excite our indignation in the absence of any regulation of defendant to justify it, cannot be considered

in this action, and the legal aspect of the case is precisely the same that it would have been if no such expulsion had taken place. It is to be regarded as if the plaintiff had gone to the caboose and could not get in because it was locked, or, being unable to get in, chose to remain outside."

Further reference to authorities is needless. The application of the rule that the proximate and not the remote cause is to be regarded, is obscure and difficult in many cases, but not in this. By the wrong of the defendant the plaintiff was carried past the station where he had a right to be left, and beyond where he had a right, from the information received from defendant's servants, to suppose he was when he left the car. For any injury or inconvenience naturally resulting from the wrong, and traceable to it as the proximate cause, the defendant may be held responsible. But before any injury had been sustained, the plaintiff discovered where he was, and started back for the road which he had intended to take. Whatever danger there was to be encountered in the way was to be found in the cattle-guard, and this he understood and calculated upon. Evidently it did not appear to him of a formidable nature, for on the supposition that he was north of the highway when he left the train, he had voluntarily started south with the expectation of crossing the cattle-guard on that side, over which he might or might not find a plank laid, when by stepping back a few rods where he supposed the station house to be, he might pass from thence out to the highway by the passage way for persons and vehicles leading from the station house to it, and thereby avoid the cattle-guard altogether. It is very clear that he did not anticipate danger. Neither, probably, would any other person have anticipated it. The crossing was a simple matter; it was only to ascertain first whether a plank or timber was laid across, and if so, to cross upon it, and if not, to step down into the excavation, and out on the other side. Where was he to look for danger? The night was dark, it is true; but even by the sense of feeling, when he knew he was within a few feet of the cattle-guard, one would expect him to be able to determine its exact location. But then something happened which it is evident that the plaintiff, with full knowledge of all the facts, did not at all expect and had not feared. Misled apparently by visual deception, he moved forward under a supposition that the cattle-guard upon the brink of which he already stood was some paces off, and this deception with the slipping of his foot concurred to produce the injury.

What was this but pure accident? It was an event which happened unexpectedly without fault. The defendant or its agents had not produced the deception or caused the foot to slip, and such wrong as the defendant had been guilty of was in no manner connected with or related to the injury except as it was the occa-

sion for bringing the plaintiff where the accident occurred. It was after the plaintiff had been brought there that the cause of injury unexpectedly arose. If lightning had chanced to strike the plaintiff at that place, the fault of the defendant and its relation to the injury would have been the same as now, and the injury could have been charged to the defendant with precisely the same reason as now. If the accidental discharge of a gun in the hands of some third person had wounded the plaintiff as he approached the cattle-guard, the connection of defendant's wrong with the injury would have been precisely the same which appears here. But the proximate cause of injury in the one case would have been the act of God; in the other, inevitable accident; but not more plainly accident than was the proximate cause here. Back of that cause in this case were many others, all conducing to bring the plaintiff to the place of the danger and the injury; the act of the defendant was the last of a long sequence; but as between the causes which precede the proximate cause, the law cannot select one rather than any other as that to which the final consequence shall be attributed; and it stops at the proximate cause, because to go back of it would be to enter upon an investigation which would be both endless and useless.

The injury being the result of pure accident, the party upon whom it chanced to fall is necessarily left to bear it. No compensation can be given by law in such cases. *Weaver v. Ward*, Hob. 134; *Gibbons v. Pepper*, 1 *Ld. Raym.* 38; *Losee v. Buchanan*, 51 *N. Y.*, 476; *s. c.* 10 *Am. Rep.* 323; *Vincent v. Stinehour*, 7 *Vt.*, 62; *s. c.* 29 *Am. Dec.* 145; *Morris v. Platt*, 32 *Conn.* 75; *Brown v. Collins*, 53 *N. H.*, 442; *s. c.* 16 *Am. Rep.* 372; *Bizzell v. Booker*, 16 *Ark.* 308; *Marshall v. Welwood*, 38 *N. J.* 339; *Paxton v. Boyer*, 67 *Ill.*; *American Express Co. v. Smith*, 33 *Ohio St.* 511; *Plummer v. State*, 4 *Tex. App.*, 310; *s. c.* 30 *Am. Rep.* 165; *Parrot v. Wells*, 15 *Wall.*, 524; *Holmes v. Mather*, L. R. 10 *Ex.*, 261. A case like this appeals strongly to the sympathies, but sympathy cannot rule the decision. Upon the undisputed facts of the case the plaintiff has no right of action for the injury which has befallen him, and the circuit court was correct in so holding. The question what judgment shall be rendered in the case is for the present reserved.

The other justices concurred.

Obligation of Company when Train Stops at Point other than Station.—When a railroad company stops its train at some point other than its station, it is bound to use all possible means to protect its passengers from injury, and will be liable for accidents to alighting passengers occasioned by passing trains, open culverts and the like, provided, of course, there is no contributory negligence. *Knight v. Portland, etc., R. R. Co.*, 56 *Me.* 234; *Pennsylvania R. R. Co. v. White*, 88 *Pa. St.* 327; *Columbus, etc., R. R. Co. v. Farrell*, 31 *Ind.* 408; *Filer v. New York, etc., R. R. Co.*, 68 *N. Y.* 124; *Hoffman v. New York, etc., R. R. Co.*, 75 *N. Y.* 605; *Whelen v. St. Louis*,

etc., R. R. Co., 60 Mo. 823; Pittsburgh, etc., R. R. Co. v. Bingham, 29 Ohio St. 364; Chicago, etc., R. R. Co. v. Wilson, 68 Ill. 167; Terry v. Jewett, 78 N. Y. 338; Cincinnati, etc., R. Co. v. Peters, 6 Am. & Eng. R. R. Cas. 126; St. Louis, etc., R. R. Co. v. Cantrell, 8 Am. & Eng. R. R. Cas. 198; Brassell v. New York Central & H. R. R. Co., 84 N. Y. 241; s. c. 3 Am. & Eng. R. R. Cas. 380; Baltimore & Ohio R. R. Co. v. Hauer, 12 Am. & Eng. R. R. Cas. 149.

Proximate and Remote Cause.—It is also well settled on general principles that a plaintiff cannot recover in case he is carried past his destination for any other damages than those which are the proximate and not the remote results of the company's act. A very full collation of the authorities on proximate and remote cause will be found in the opinion. See particularly the following case, the facts of which are somewhat similar to those of the case reported above. Henry v. St. L., K. C. & N. R. Co., 76 Mo. 288; s. c. 12 Am. & Eng. R. R. Cas. 136. See also, Brooks v. Boston & Me. R. R. Co., 135 Mass. 21; s. c. 16 Am. & Eng. R. R. Cas. 345; Curtis *et ux* v. Detroit & M. R. R. Co., 27 Wisc. 158; Hartwig v. Chicago & N. W. R. Co., 49 Wisc. 358; s. c. 1 Am. & Eng. R. R. Cas. 65; Stiles v. Atlanta, etc., R. R. Co., 8 Am. & Eng. R. R. Cas. 195; McClelland, Adm'r, v. Louisville, N. A. & C. R. Co., *supra*.

PRICE *et al.*

v.

PENNSYLVANIA R. Co.

(*Advance Case, Supreme Court of the U. S., January 26, 1885.*)

As the statutes of the United States, which authorize the employment and direct the service of mail-route agents, do not make an agent so carried by a railroad company a passenger, or deprive him of that character, in construing the Pennsylvania statute, giving a right of action for death caused by negligence, a writ of error will not lie to review the decision of the Supreme Court of Pennsylvania holding that an agent so killed was not a passenger within the meaning of the State statute.

In Error to the Supreme Court of the State of Pennsylvania.
See 1 Am. & Eng. R. R. Cas. 234.

E. A. Newman and *Chas. A. Ray*, for plaintiffs in error.

John Dalzell, for defendant in error.

MILLER, J.—A statute of Pennsylvania, passed in 1851, makes the provision, now become common, for a recovery by the widow or children of a person whose death was caused by the negligence of another, of damages for the loss of the deceased. A statute passed April 4, 1868, provides that, "where any person shall sustain personal injury or loss of life while lawfully engaged or employed on or about the road, works, depot, and premises of a railroad company, or in or about any train or car therein or thereon, of which company such person is not an employé, the right of action or recovery in all such cases against the company shall be such only as would exist if such person were an employé: pro-

vided, that this section shall not apply to passengers." The plaintiff in error sued the defendant in error for the loss of her husband by a death which the jury, by the following special verdict, found to be caused by the negligence of the company's servant or servants:

"We find for the plaintiff in the sum of (\$5,000) five thousand dollars, subject to the opinion of the court on the question of law reserved, to wit: We find that A. J. Price at the time of his death was route agent of the United States post-office department, duly appointed and commissioned, his route being on the Western Pennsylvania Railroad, from Allegheny City to Blairsville, in the State of Pennsylvania; that his duties as such agent required him to be on the mail car on the mail train of said road to receive and deliver mail matter; that for the purpose of his business and that of the postal department, and in accordance with the laws of the United States and the regulations of the post-office department, and acceptance thereof by the railroad company, one end of the baggage car on the mail train was divided off and fitted up for the use of the department in carrying the mails, and that the duties of the said route agent required him to be in said room in the car during the running of the train; that said Price was daily on said train, making a round trip from Allegheny City to Blairsville and return; that on the twenty-third day of July, 1877, while at his post in his room on said car, Mr. Price was killed in a collision of the mail train coming west with another train of the defendant company going east; that said collision was caused by the negligence or misconduct of the conductor and engineer in charge of the train going east in neglecting or disobeying orders, and in failing to take necessary precaution to avoid a collision.

"We find that the Pennsylvania Railroad Company, by resolution dated April 16, 1868, accepted the provisions of the act of assembly, approved fourth April, 1868, (P. L. p. 59,) and that [at the] time of the collision the Pennsylvania Railroad Company was operating the Western Pennsylvania Railroad under lease.

"If, under this finding of facts, and under the acts of congress and acts of assembly offered in evidence, and the postal regulations in evidence, the court should be of the opinion that the plaintiffs, as widow and children of deceased, are entitled to recover, then judgment to be entered on the verdict in favor of the plaintiffs. If the court should be of the opinion that the law is with the defendant, then judgment to be entered in favor of the defendant *non obstante veredicto*."

Upon this verdict the judge of the trial court held that the deceased was a person engaged in and about the train, within the meaning of the act of 1868, but that he was also within the *proviso* as a passenger, and gave judgment for plaintiff on the verdict. The judgment was reversed by the Supreme Court of Pennsylvania

on the ground that the deceased was not a passenger within the meaning of the proviso, and a judgment was rendered for defendant, to which this writ of error is prosecuted.

The plaintiff argues here, and insisted throughout the progress of the case in the State courts, that, by reason of certain laws of the United States as applied to the facts found in the verdict of the jury, the decedent was a passenger, and the supreme court erred in holding otherwise. These laws are thus cited in the brief of plaintiff's counsel: "Sec. 8, act March 3, 1865, (13 St. at Large U. S. 506,) provides that, 'for the purpose of assorting and distributing letters and other matter in railway post-offices, the post-master general may, from time to time, appoint clerks who shall be paid out of the appropriation for mail transportation.' Sec. 4,000, Rev. St. U. S. requires that 'every railway company carrying the mail shall carry on any train which may run over its road, and without extra charge therefor, all mailable matter directed to be carried thereon, with the person in charge of the same.'"

We do not think these provisions either aid or govern the construction of the proviso in the Pennsylvania statute. The person thus to be carried with the mail matter, without extra charge, is no more a passenger, because he is in charge of the mail, nor because no other compensation is made for his transportation, than if he had no such charge; nor does the fact that he is in the employment of the United States, and that defendant is bound by contract with the government to carry him, affect the question. It would be just the same if the company had contracted with any other person who had charge of freight on the train to carry him without additional compensation. The statutes of the United States, which authorize this employment and direct this service, do not, therefore, make the person so engaged a passenger, or deprive him of that character, in construing the Pennsylvania statute. Nor does it give to persons so employed any *right*, as against the railroad company, which would not belong to any other person in a similar employment by others than the United States.

We are therefore of opinion that no question of federal authority was involved in the judgment of the Supreme Court of Pennsylvania, and the writ of error is accordingly dismissed.

Duty of Railroad Company to Mail Agent Riding on its Trains.—A mail agent traveling upon the trains of a railroad company is not, strictly speaking, a passenger. But the company owes a certain measure of duty, and in case of injury through the company's negligence, an action is clearly maintainable. *Hammond v. North Eastern R. Co.* 6; S. C. 130; *Nolton v. Western R. Corp.*, 15 N. Y. 444; *Cellett v. London. etc., R. Co.*, 15 Jur. 1058; *New York, L. E. & W. R. Co. v. Seylott, Adm'x*, 18 Am. & Eng. R. R. Cas. 162.

And see *Blair v. Erie R. Co.*, 66 N. Y. 318; *Yeomans v. Contra Costa Steam Nav. Co.*, 44 Cal. 71; *Union Pacific R. Co. v. Nichols*, 8 Kans. 505.

General Reference.—A full exposition of the Pennsylvania statute referred to in the principal case, together with a collection of the authorities on the

construction of such statute, will be found in the note appended to the prior report in 1 Am. & Eng. R. R. Cas. 234.

See Kirby v. Pennsylvania R. R. Co., 76 Pa. St. 506; Mulhonnin v. Delaware, L. & W. R. Co., 81 Pa. St. 366; Ricard v. Pennsylvania R. R. Co., 89 Pa. St. 193; Gerard v. Pennsylvania R. R. Co., 5 *Weekly Notes of Cases*, 251.

LOUISVILLE & NASHVILLE RAILROAD CO.

v.

McKENNA AND WIFE.

(13 *Lea's Reports (Tenn.)* 280.)

The general rule in this State is that the construction of a written instrument introduced as evidence, if complete and intelligible in itself, is matter of law for the court, expert testimony being admissible in proper cases to aid the court in reading the instrument.

An accident having occurred on a railroad by means of an obstruction put on the roadway by an unknown third person at a particular trestle in mile 60, the superintendent issued a written order to the employes of the passenger trains to slow up, run carefully, keep a sharp lookout at mile 60, and while the order was still being acted on another accident occurred from a similar obstruction at the same trestle, by which the plaintiff was injured. *Held*, that the order required the engineer to slow up enough to stop the train on short notice when the emergency did arise, and the court properly instructed the jury to that effect.

The duty of railroad companies in cases of malicious instruction considered.

APPEAL in error from the Circuit Court of Shelby county.

Estes & Ellett, for railroad.

W. H. Carroll and *C. W. Heiskell*, for McKenna.

COOPER, J.—The McKennas recovered judgment against the railroad company for injuries to the wife as a passenger on the company's train, occasioned by the cars being thrown from the track by an obstruction put thereon by an unknown person. Upon the appeal in error of the company, the referees report in favor of affirmance. The company except to the report, their exceptions going to the law of the charge.

The accident occurred to a regular passenger train at a trestle on mile 60 of the road, about half after five o'clock in the morning of November 12, 1873. The obstruction was caused by placing a T rail diagonally across the track about midway of a trestle, one end being under the south rail of the roadway and the other end resting on the north rail and braced on both sides by cross-ties. The proof is conflicting as to whether the morning was clear or dark, cloudy and foggy. The engineer saw the obstruction about seventy-five or eighty feet before the train struck it. The train was moving at between eight and ten miles an hour, the air-brakes having been applied, and the speed of the train slack-

ened before reaching the trestle in obedience to an order of the superintendent, which was to slow up, run carefully, and keep a sharp lookout at mile 60. This order of the superintendent had been given because six weeks before that time a similar accident had occurred at the same trestle. And the employes admit that they were acting on the order as still in force. The instruction of the trial judge to the jury complained of related to the duty of the engineer, in consequence of the order mentioned.

The charge objected to is: "But if the evidence shows that the obstruction was put on the track by a stranger, and further shows that by reason of a previous accident at the same place from a similar cause a short time before, the engineer had been warned to 'slow up' when approaching this trestle, and to keep a sharp lookout ahead, and he failed in either of these duties, or failed to slow up enough to stop his train on short notice when it was possible for him to do so; in other words, failed to prepare as fully as possible for the emergency which he was warned might arise at the place of the accident, and by reason of such failure was unprepared to stop quickly his train when the emergency did arise of which he had been forewarned, and the accident occurred by reason of such failure, I charge you to find for the plaintiff."

The company requested the court to add to the charge quoted above the following qualification: "But if you believe from the testimony that the order to slow up and keep a sharp lookout meant that the engineer should reduce the speed of the train to ten, fifteen or twenty miles per hour; or if you believe from the testimony that the order in this case was to reduce the speed of the train to ten or fifteen miles an hour, and keep a sharp lookout, and that the engineer obeyed the order, then the defendant would not be liable, although the engineer did not reduce his speed to a point below the order, so as fully to prepare for the emergency that actually occurred."

The company also requested the trial judge to give the following instruction: "If the jury believe that said order was a proper and prudent order and regulation for the running of the passenger train at the time and place of said accident, and that the same was properly obeyed by the engineer in its true sense and meaning by slowing up to a speed not exceeding ten miles an hour, running carefully and keeping a sharp lookout at the time and place of the accident; and further, that the accident was occasioned by an obstruction maliciously placed on the track by some third person unknown, and that the same was seen by the engineer as soon as it was possible to see it, and that then every means in his power was promptly used to prevent an accident, the jury should find for the defendant. It was not, as a question of law, the duty of the engineer, in the circumstances supposed, to stop whenever he approached the space covered by said order, or to reduce the speed

of his train so that it could be instantly stopped at any moment while passing over said space. But it is for the jury to say from the evidence whether what was done by the engineer was sufficient to relieve the company from the slightest imputation of negligence." These requests were refused.

The referees say: "On the part of the plaintiffs in error, it is insisted that negligence in reference to the failure to slow up could only be predicated of disobedience to the order, and inasmuch as the plaintiffs in error proved that to 'slow up' in railroad orders meant to reduce speed to ten, fifteen or twenty miles per hour, that the charge of the judge, imposing upon the engineer a duty far more stringent than the order, was erroneous. This objection undertakes to limit the issue to the letter of the order. The charge was correct. If they in whose employment the engineer was, for any reasons satisfactory to themselves, anticipated an accident at a given point, or gave special instructions for care at a given point, in consequence of past or apprehended accidents, so as to bring home to him notice of the necessity of extra precaution at the place indicated, it is not error to charge that his precautions must be such as might arrest an anticipated danger, although they exceeded the letter of his order from the company. For under the circumstances producing, and as now appears justifying, the order, it was the proper duty of the company not only to issue an order for such precaution, but it was equally its duty, through the engineer, to enforce it in its full spirit and intent, the avoidance of the danger feared, by taking such control of the train by the use of brakes, slackening speed, etc., as would effectuate the object intended, and enable him to stop the train on short notice."

It is not contended that the mere fact that a similar accident had occurred at the same place six weeks before, would of itself impose upon the railroad company any particular duty in running its trains over that part of the road. There is no presumption that because an obstruction has been maliciously put upon the track of a railroad at one place, a similar obstruction will afterwards be put at the same place, or for that matter on any other part of the road. The law never presumes the occurrence, much less the recurrence, of an illegal act, and human experience would scarcely sustain the conclusion that the same crime will be repeated in the same place. While this precise point seems never to have passed into judgment, it has been held that a railway company is not liable for an injury inflicted by a stray dog at their station, although a few hours before it had there bitten another person, if it was then driven away. *Smith v. Great Eastern Railroad Co., L. R., 2 C. P. 1.* It must be left to the railroad company to determine what directions, if any, it will give its employes under the circumstances of the particular case, under the usual rule which regulates the duties of the company to the public. If the company under-

takes to give special instructions to its employés at the time, these instructions must be the measure of the action of the employés. All that they can be required to do is to obey the instructions in their "full spirit and intent." No reason occurs why, merely because instructions are given, the employés should be required, in addition to obeying them, to take every other precaution necessary to avert an accident. The only question in such case would be whether the instructions were reasonable and proper. If, therefore, his honor, the trial judge, intended to charge, and the referees intended to report, that, under the order in question, the engineer was bound to go beyond the instructions, and adopt such precautions, although not included in the order, as would be necessary to avert the danger of a similar accident to the one that had occurred, they were in error.

It is altogether another question, however, whether the order actually given did not require the employés to do all that the trial judge instructed the jury should have been done. The company, in view of its knowledge of all the facts touching an accident and its duty to the public, may be required to give orders, or may give them, in which event the duty of the employé is to obey in "letter and spirit," and a failure to do so would be negligence for which the company would be responsible. We can easily conceive of cases where the company may have knowledge or good reason to believe that another obstruction would be put upon the road. In that event it would be its duty to order the train not only to slow up, but to be brought to a full stop, and the track examined before proceeding. And generally, where circumstances demand precautionary measures, they must be taken, and the law requires a degree of care proportioned to the risk. The company did not give the order which is deposed to by the witnesses, with special reference to the previous accident, and the employés were acting under it. We do not understand the trial judge to tell the jury they must go beyond the order. He merely puts a construction upon that order, and undertakes to define the duties of the employés under it.

The contention of the company was, that the words "slow up" have a definite meaning in railroad parlance, and signify that the rate of speed of the train should be reduced to ten, fifteen or twenty miles an hour, and testimony was introduced to that effect. And no doubt the reduction of the usual rate of speed of a passenger train to either of the number of miles mentioned, would be a slowing up in a general sense, and of course, in the usual acceptance of the words. But his honor's idea is that the phrase means something more when used in an order intended for a particular purpose, and based upon the possibility that an accident from a malicious obstruction may occur at the designated place, because a similar accident from the same cause had recently occurred. In

that view, he thinks the company meant that the engineer must so slow up as to be able, if by a sharp lookout he saw that there was such an obstruction, to stop the train in time to prevent a similar accident to the one that had already occurred. It would be useless, he thinks, to make the order unless it was intended to be operative as long as it remains in force. The particular instruction is obscured by the use of the disjunctive "or" instead of the explanatory phrase "that is," or words of like purport. The clause which follows the disjunctive particle is really an explanation of what his honor considers would be a failure of the duties to slow up and keep a sharp lookout. He says, in substance, that the company would be liable if, because of a former accident at the same place from a similar cause, a short time before, the engineer had been warned to slow up when approaching the trestle, and to keep a sharp lookout ahead, and he failed in these duties, and it would be a failure of these duties if he neglected to slow up enough to stop his train on short notice. Unless this is his honor's meaning, he has not construed the order, and he has certainly not left it to the jury to put their own construction upon it, in connection with the testimony. In this view, the real points of contest are whether the judge had the right to construe the order, and did correctly construe it.

The general rule in this State undoubtedly is that the construction of a written instrument introduced in evidence, if complete and intelligible in itself, is matter of law for the court: *Bedford v. Flowers*, 11 Hum. 242. And it is also the general rule that where the facts are ascertained, even in the case of parol testimony, the court declares the law: *Gregory v. Underhill*, 6 Lea, 207, 211. The testimony of experts is, of course, admissible in proper cases, to aid the court in reading the instrument: 1 Greenl. Ev. Sec. 280. The expert testimony in this case only tends to show what the words themselves fairly import, that to "slow up" a train means to diminish its speed, the extent of the diminution being necessarily controlled by the object or purpose had in view. To "slow up" in any given case must be such a slowing up as the particular exigency requires. To slow up and keep a sharp lookout for an expected or possible obstruction must mean such slowing up and watchfulness as will prevent the accident, the order being otherwise of no avail. And so the trial judge properly thought and charged. The instructions asked for by the plaintiffs in error were based upon a different theory, and were properly refused.

The exceptions to the report of the referees will be disallowed, and the judgment below affirmed.

Cooke, Sp. J., dissents.

MISSOURI PACIFIC RAILWAY *et al.*

v.

COLLIER.

(Advance Case, Texas, October 31, 1884.)

Where, in a suit against the I. & G. N. Ry., in Smith county, it was alleged and shown that such railroad was operated and leased by the M. P. Ry., and notice with accompanying interrogatories propounded to certain witnesses was served on the local agent of M. P. Ry., at Tyler, in Smith county. *Held*, to be a good service.

In a suit by a passenger against a railroad company to recover damages for personal injuries where it was alleged by defendant that the accident, causing the injuries for which this suit was brought, was one of that class of accidents springing from natural causes against which no human foresight could guard; that the broken rail causing the accident was, before that time, sound and serviceable, and that the sudden fracture in it was caused by the supreme degree of cold to which it was subjected, and not from any negligence of defendant, and plaintiff contends that the accident was caused by the culpable acts of defendants in running the train at too high a rate of speed over an old and much worn track, causing the rail to break, evidence of the general condition of the road-bed, etc., at and near the accident, is admissible.

Where a witness was detailing the high rate of speed at which the train was running, and for the purpose of making his meaning clearer to the jury, stated an exclamation of a fellow passenger as to the short time consumed in running between stations. *Held*, admissible.

APPEAL from Smith county.

Whitaker & Bonner, for appellants.

Chilton, Robertson & Finley, for appellee.

Suit by appellee against appellants for damages for personal injuries sustained while a passenger on the I. & G. N. Ry., which was alleged was being operated by the Mo. Pac. Ry., caused by a car, in which plaintiff was seated, leaving the track and turned upside down an embankment, causing injury to appellee's back and spine and numerous other bruises.

Appellants plead a general denial, and that the wreck was one of those inevitable accidents against which human foresight could not provide, in that the train was properly equipped and manned, and was running at a proper rate of speed; that the road-bed was in proper condition and repair, but that an apparently sound iron rail broke, from the effects of cold making it brittle, and threw the car from the track; that against such accidents as this no known precautions could provide. Judgment was rendered for plaintiff for \$4,000, from which this appeal is prosecuted.

The first assignment of error relates to the action of the court in refusing to suppress certain depositions of which the notice with accompanying interrogatories propounded to J. C. Howell

were served, one copy by the sheriff of Smith county, Texas, upon A. L. Clark, local agent of the Missouri Pacific Railway Company at Tyler, Smith county, Texas; the other copy by the sheriff of Anderson county, Texas, by delivering to W. R. Maxwell, in person, at the office of the I. & G. N. R. R. Co. and M. P. R. R. Co., in Palestine, a true copy. The defendant, in crossing these interrogatories, expressly reserved the right to object to this service, and in no way waived the want of service, and before the commencement of the trial made a motion to quash the depositions of the witness upon this as well as other grounds.

The court admitted evidence of several witnesses as to the condition of appellants' road-bed and track at and near the point where the injury in question was sustained.

The defense in this case set out in defendant's answer is, that the wreck of the train was one of those inevitable accidents against which human foresight could not provide; that it was the result of a broken rail, apparently sound, which broke from the effects of cold. The whole testimony of defendant was directed to establishing this theory.

On the other hand, appellee alleged that the wreck was caused by the careless running of the train, and the reckless speed of the same over *an old railroad out of repair*, that under these circumstances and in this manner the train was so run as aforesaid as to cause a defective iron rail to throw the train from the track, etc. The evidence admitted tended to establish this theory.

The other matters considered can be understood from the opinion.

WEST, J.—Under the facts of this case as disclosed by the record, the district court committed no error in declining, at the instance of appellants, to suppress the depositions of the witness Howell and others. We think that, under the facts of this case, the service of the notice and interrogatories on the local agent of the appellants at Tyler was sufficient and was good legal service. The petition avers that the evidence shows that, as a matter of fact, the Missouri Pacific Railroad Company had charge of, and was, in fact, at the time of the service, lawfully operating, the International & Great Northern Railroad Company in Texas. Under such circumstances, we regard the service of the notice made in this case as sufficient and lawful notice. Acting under it, too, the appellants punctually crossed the interrogatories, and there does not appear to be any such irregularity or illegality in the mode and manner of service as would vitiate it. Rev. Stats., arts. 1223, 2219, 2223, 2233.

Nor did the district court, in our opinion, commit any error, under the state of the pleadings and evidence in this case, in allowing the testimony of Collier, Buttler, Still and others to go to the

jury for their consideration as to the general condition of appellants' road-bed and track at and near the point where the injury in question was sustained. The defense of the appellants was based upon the assumption that the wreck under consideration was one of the results of that class of accidents springing from natural causes against which no human foresight could guard; that the broken rail in question was, just before the occurrence of the accident, entirely sound and serviceable, and the sudden fracture in it which caused the injury resulted by reason of the extreme degree of cold to which it was at the time subjected, and from no negligence or want of care or due precaution on their part. On the other hand, the appellee, in his pleadings and by his evidence, put this very matter in issue. He contended that the wreck in question, and the consequent injury resulting to him from it, was not produced by the reduction in temperature, but was caused by the culpable acts of appellants in running the train in question at too high a rate of speed over an old and much worn railroad-bed and track, which was not in a sufficiently good condition or repair to authorize the running of trains over it at so great a rate of speed, and that by this culpable negligence and breach of duty on the part of appellants, the iron rail in question, which was already old and had been much used, was broken, and the wreck, as a consequence, ensued.

In this state of the record and under the pleadings of both parties, we are of the opinion that the district court did not err in permitting the evidence now under consideration to be heard and considered by the jury in arriving at their conclusions, and in determining what verdict, under the evidence, they should return to the court in response to the issues that were submitted to them for determination.

Under the state of facts existing at the time, as disclosed by the record, we do not regard the evidence of the witness Collier as illegal or inadmissible. He was detailing facts within his own knowledge as to the very high rate of speed at which the train in question seems to have been moving; and as a circumstance growing out of the high rate of speed, and as calculated to making his meaning clearer to the jury, he calls their attention in this immediate connection to the exclamation of a fellow passenger, made at the time, as to the short period of time consumed in passing from Overton to Jarvis Switch. We do not regard this testimony in this connection as hearsay, or as improper, or inadmissible under the circumstances.

The same may be said of the testimony of the witness Chilton. To the evidence, however, of the last named witness no proper bill of exceptions seems to have been taken.

Upon a careful examination of the case, the verdict cannot be said to be contrary to the weight of the evidence. The proof, as

is usual in this class of cases, was conflicting in its character. Under such circumstances, the disputed and doubtful matters must in the nature of things be left for the consideration and determination of the jury; these are subjects on which it is their province to pass. These matters are strictly for their determination.

There appears to be no serious or material error in the record, and the judgment of the district court is accordingly affirmed.
Affirmed.

DENVER, S. P. & P. R. Co.

v.

PICKARD.

(*Advance Case, Colorado, February 20, 1885.*)

A time-table which announces on its face that it is for the government and information of employes only, and in terms reserves to the company the right to vary therefrom at pleasure, and which bears also the explanation as to the stations mentioned in it, that flag stations are designated by a star, is not of itself sufficient evidence to show that a station not so designated on it had been advertised either to the public or the plaintiff as a regular passenger station.

In the absence of proof that at a certain point on defendant's road a passenger ever got on or off a train while in motion by invitation or direction of defendant's employes—it appearing that the slowing up of trains there was designed for other purposes—there is no such evidence of custom as will bind the company in an action for damages caused by a party's endeavoring to get on a moving train at that point.

APPEAL from the District Court of Chaffee county.

Teller & Orahoad, for appellant.

Browne & Putnam, for appellee.

BECK, C. J.—This was an action against the railroad company for damages alleged to have resulted to the plaintiff from its negligence. Judge Cooley says:

“Where negligence is the ground of an action, it devolves on the plaintiff to trace the fault for his injury to the defendant, and for this purpose he must show the circumstances under which it occurred. If from these circumstances it appears that the fault was mutual, or, in other words, that contributory negligence is fairly imputable to him, he has, by showing them, disproved his right to recover.” Cooley, Torts, 673.

The plaintiff's injury, complained of in this case, was serious and permanent, and by the verdict of the jury and judgment of the court he was awarded, as damages therefor, the sum of \$25,000.

The first question presented for our consideration is whether the court erred in denying the motion for nonsuit interposed by defendant's counsel at the close of plaintiff's direct testimony. A proper determination of this question involves the decision of two other legal questions arising upon the facts in evidence, viz. :

First.—Was the station Divide, where the injury was received, a regular passenger station on the defendant's road, where its trains were legally obliged to stop for passengers? *Second.*—Did the legal relation of carrier and passenger subsist between the parties at the time of the injury?

In support of the proposition that Divide was a regular passenger station, plaintiff introduced in evidence, against the objections of the defendant, a time-table issued by the officers of the railroad company, and which went into effect on the day of the accident. The pleading was as follows :

"The Denver, South Park & Pacific Railroad Time-table, No. 37. To take effect Thursday, October 21, 1880, at 12:15 o'clock A. M. For the government of employes only. The company reserves the right to vary therefrom at pleasure."

The table contains the names of the various stations upon the line of defendant's road, including the station Divide, with the times of the arrival of trains thereat. In a note at the bottom it is stated that flag stations are designated by a star. The station in question is not so marked. While the evidence was admissible, in our judgment, in connection with other facts bearing upon the question, it falls far short of proving the fact sought to be established. It does not purport to be an advertisement for the information of the traveling public, but, on the contrary, every person into whose hands such card may fall is advised against such a conclusion, and that it cannot be relied upon for such purposes.

In *Beauchamp v. International & G. N. Ry. Co.*, 56 Tex. 239; s. c. 9 Am. & Eng. R. R. Cas. 307, it was held that a time-table, which on its face announces that it is for the government and information of employes only, and, in terms, reserves to the company the right to vary therefrom at pleasure, is not admissible in evidence in a suit for damages against the company for not stopping at a place mentioned therein. Perhaps that ruling is not applicable here, owing to the fact that other evidence was submitted upon the same point. Plaintiff testified that the company's station agent at Buena Vista, where plaintiff resided, and where he held the office of postmaster, gave him one of these cards on the day preceding the accident, to be used in making up the mails. Joseph Nevitt, deputy-postmaster at Divide, testified that Divide was a regular station, but his answers to a few questions disclose his ignorance of the subject :

"*Question.*—Did the trains always stop there? *Answer.*—Whenever they felt inclined. *Q.*—What do you call a regular

station and a flag station? A.—I am not railroad man enough to define it. Q.—And you think you are able to say positively that was not a flag station? A.—I am, by their own actual time-card."

He further testified that defendant's master of transportation, John McCormick, had previously declared to him that Divide was a regular station; that it was the duty of engineers to stop their trains there, and requested the witness to report those who did not do so. It does not appear that the declarations of McCormick had been communicated to the plaintiff, so they certainly did not influence his conduct. Nor did the fact that one of these cards was sent to him for the special purpose mentioned, by an employé of the defendant, previous to his injury, warrant him, in view of the precautionary advice therein contained, in relying upon it for any other purpose. But the plaintiff's testimony disclosed other facts with which he was acquainted, and which have an important bearing on the question. There was at this station neither a station-house, ticket-office, nor waiting-room. No tickets were sold here for any point on the line, nor was there a station agent or a railroad employé in the place. There was a platform beside the track, such as were used at other stations, but even this did not belong to the company, the witness Nevitt stating that it was his own private property. The latter fact is not material, however, since the company used it when it had occasion to do so. Plaintiff's witnesses all agree that trains did not regularly stop at this station, some of them saying it was necessary to flag them to have them stop. We consider the testimony wholly insufficient to show that Divide had been advertised either to the public or to the plaintiff as a regular passenger station. It certainly does show that it was not used as such. Regarding the relation which the plaintiff bore to the railroad company, his counsel insist that going upon the platform with the *bona fide* intention of taking the train and paying his fare, consummated the relation of carrier and passenger between the parties. It is conceded that he held no ticket, but he testified to his ability to pay his fare, which counsel say was sufficient. In support of the proposition that plaintiff sustained the relation of a passenger, the following is quoted from Shear. & R. Neg., Sec. 262:

"Any acts indicating on the one side an offer or request to carry or to be carried, and on the other an acceptance of such offer or request, are sufficient. It is not necessary, in order to create the relation of carrier and passenger, that the latter should have actually entered the vehicle, much less that it should have started on the journey without him."

Other parts of the same section are germane to the facts of the present case, viz.:

"A passenger is a person who undertakes, with the consent of

the carrier, to travel in the conveyance provided by the latter.

* * * Where the carrier provides a waiting-room for passengers, entry into that room, with intent to travel under the carrier's charge, is sufficient to give the rights of a passenger. Where it is the practice of the carrier to stop for passengers when hailed, the fact that he stops for a passenger hailing him is sufficient evidence that he accepts such person as a passenger; and from that moment the relation begins."

The rule of this section would not seem to include a case where no waiting room was provided, no tickets sold, and where the carrier did not stop for the passenger, and where the plaintiff is unable to testify or prove that the carrier was aware of his intention to get upon the train. Counsel also quote to the same proposition the following detached sentences from Hutch. Carr.: "Payment of fare or purchase of ticket not required." Secs. 565, 568. "Waiting at station for expected train is enough." Sec. 559. "Relation arises without priority of contract." Sec. 567. "Averring a readiness to pay fare is sufficient." Sec. 565, note 2. A reference to the foregoing sections shows that these general expressions are materially qualified by the context; for example, Sec. 465:

"Taking his place in the carrier's conveyance, with the intention of being carried, creates an implied agreement upon the part of the passenger to pay when called upon, and puts him under a liability to the carrier, from which at once spring the reciprocal duty and responsibility of the carrier."

Secs. 566, 567 relate to the carrying of persons gratuitously, and upon free passes. The authorities referred to in note 2, Sec. 565, relate to cases where passage is taken without prepayment. It is apparent that these citations do not sustain the proposition.

The rules cited in Thomp. Carr. Pass. 43 are equally inapplicable to the facts in the case before us. It is there said that payment of fare is not necessary to create the relation, but that going into the depot or waiting-room of a railway company and waiting for the means of conveyance with the *bona fide* intention of becoming a passenger, or upon a steamboat, in good faith, to take passage thereon, creates the relation although no fare has been paid. But it is claimed that a custom existed at this station for which the defendant is responsible, and which, in connection with the facts proven, brings the case within the rules of the foregoing authorities. It is alleged that it was the practice of the defendant's employes to slow up the trains in passing this station so that passengers could get on or off as they desired, and that travelers knowing or becoming informed of the custom frequently availed themselves of it; that the plaintiff had been told of this custom, also that trains frequently passed by without stopping, and that he must be prepared to get aboard the train while in

motion. It is argued that a custom to slacken speed for the purpose of enabling passengers to get on and off moving trains is equivalent to an invitation to do so, and renders the carrier liable for injuries sustained in an attempt to comply therewith. The substance of the plaintiff's testimony on this point was that several persons residing at Divide told him that trains frequently passed without stopping, and that he would have to look out and get on while the train was in motion; that passengers frequently had to do this. Joseph Hewett swears that he told plaintiff that there had been occasions when the train passed by and left passengers, and it would be well for him to be on the alert. He also stated that he knew of several instances where persons had got on and off moving trains at the station, but did not know whether it was done with the assent of the officers of the company or not. O'Neil, who had resided there ever since the road was built, said he had witnessed several similar instances, but did not know whether it was a regular custom or not. He had noticed that the trains slackened up to take on the mail. McArthur jumped off the train once at Divide while it was in motion, and at another time was carried two miles past. Cram knew nothing of the custom, but mentioned two instances wherein trains failed to stop for him at this station.

No witness was able to swear to an instance where a passenger got on or off a train in motion by invitation or direction of defendant's employes. This being the state of the proof, and it appearing that the slowing up may have been for other purposes than those alleged, we think the proof of the custom mentioned is insufficient to establish it. It remains to inquire whether the facts and circumstances transpiring immediately prior to the accident justified the plaintiff's attempt to jump upon the train. Deputy-postmaster Russell accompanied the plaintiff to the platform, carrying the mail to be sent off, and a lantern to signal the train. The train arrived from Denver that evening at six o'clock. After it appeared around the sharp curve to the north of the station, Russell swung his lantern across the track, as a signal to stop, and one whistle was blown from the engine, which, plaintiff says, was in response to the signal. The train slowed up, and Russell set down the lantern, and, picking up the mail sack, held it out for the mail agent as the train passed by, but he failed to get it. The train did not stop, and plaintiff attempted to get upon the front end of the rear car as it passed the platform. He caught the iron railing with his left hand, the iron handle on the end of the car with his right, and put his right foot on the car step. Just at that moment, and as he was about to raise to the platform, the car was violently jerked by letting off brakes or putting on steam, and plaintiff was hurled underneath the platform, and his left arm so crushed by the rear truck, which passed over it, as to require

amputation. The authorities say that circumstances may exist which will make it a question for a jury whether an attempt to get upon a train in motion constitutes such negligence on the part of a passenger as to bar an action for injuries received in such attempt. Judgment for damages has been sustained in such cases where there has been gross misconduct on the part of the railroad company; as in failing to give necessary time for passengers to get upon the train before setting it in motion, failing to come to a full stop at a regular station where passengers are to be taken on or let off, and where great emergency exists for passengers to proceed on their journey; also where invitations or directions are given to passengers by railroad employes, or by existing customs of railroad companies, to get on and off their trains while in motion. But these are cases where plaintiffs were clearly entitled to the rights of passengers, and, moreover, the trains were moving very slowly in all such cases.

In reviewing the case made by the plaintiff, we are of opinion that it does not contain the elements essential to a recovery. It does not appear, except inferentially, that any one upon the train was aware of the plaintiff's desire to get aboard. As the train swept by, the plaintiff neither spoke nor made sign to any one of the company's train-men of his desire to get on, nor did he receive any encouragement to do so, unless by the checking of speed as the train approached. He did not even prove that the whistle sounded from the engine was the stop-signal in use by the company. The witness Glassbrook, who had been a railroad employe, and who was present and witnessed the accident, stated that he heard the station signal and saw the lantern waived, but did not remember any response to the flagging.

Concerning the rate of speed at which the train passed the platform, the plaintiff and his witnesses made different estimates. The plaintiff's estimate was six to eight miles per hour; Joseph Hewett's estimate, five miles per hour; and O'Neil's, four and a half to five. As already mentioned, it seems to have been running so fast that the mail agent on board failed to get the mail held out to him. The proof failing to show an obligation to stop regularly at this station, or that the plaintiff's desire to become a passenger was known to the company's agents, it is difficult to perceive wherein consists such palpable misconduct on the part of the defendant as to render it liable in damages, or to justify the risk to life or limb assumed by the plaintiff. The plaintiff had some previous experience in getting on and off trains while in motion, and says he knew the danger attending such efforts. He knew that the sudden checking and starting was accompanied with more or less jerking of the coaches, a fact recognized by his witnesses, and it is very doubtful if the circumstances of emergency under which he acted would have justified a much less degree of risk than

he took. He came to Divide the day previous in a buggy, and concluded to return by train. Being postmaster at Buena Vista, his anxiety to return home was on account of his official business, which was not well understood by those left in charge of the office. He stated, however, that the drive by horse and buggy could be accomplished in two hours, and that he presumed he could have gotten a horse as well as not, and have driven home. In Hutch, Carr., Sec. 641, it is said:

"Thus nothing is more universally agreed upon, perhaps, than the attempt to get upon a railway train while in motion, without a necessity for so doing, induced by the conduct of the employes of the railway company, and without an invitation to do so from its agent acting in the line of his duty, precludes the passenger from the right to recover for the injury which may be thereby occasioned."

That the necessity for taking such risk, and that circumstances relied upon in the present case as constituting an invitation to get on, do not bring the case within the exceptions mentioned, is shown by a subsequent portion of the section:

"Nor will the refusal to stop the train, nor the custom of those in charge of the train to slacken its speed at the particular station, in order to take on passengers without coming to a stop, excuse the negligence of the party. * * * If it had adopted a practice of receiving its passengers while in motion, it would be reckless conduct on the part of the company or of those in charge of its trains, which would not justify or excuse the equally reckless imprudence of the injured party."

The authorities which recognise the right of passengers, under certain circumstances, to rely and act upon the invitations and directions of duly authorized agents of railway companies, limit the doctrine to cases which do not involve the element of recklessness. Thus, in *Pierce, R. R.* 329, the author says:

"But notwithstanding such direction, invitation, or assurance, the plaintiff will not be excused in following it, if the act involves a reckless exposure of himself, or is one which a man of common prudence would not do. A mere permission from the company's servants to do a dangerous act does not relieve the injured person from the responsibility for its consequences."

Analogous cases held proper for the consideration of juries are cases wherein the relation of passenger and carrier clearly appears, and the trains are moving very slowly. If a passenger holds a ticket entitling him to alight at a particular station where the train stops, but not long enough to afford him a reasonable time to alight, and he attempts to do so before the motion has become at all rapid, and while the act would not seem dangerous to a man of ordinary prudence, but nevertheless he is injured thereby, it is held that he is entitled to damages. The basis of action is the flagrant breach

of duty on the part of a carrier. *Illinois Cent. R. Co. v. Able*, 59 Ill. 131. Where a passenger holding a through ticket arrived at the station where the connecting train was standing, but without giving him time to change cars it started out, and in his effort to get aboard he fell and was injured, the supreme court said it was a proper case for the consideration of a jury. The motion of the train in this case was so slow as to be only distinctly perceptible to those alongside of it. *Johnson v. West Chester & P. R. Co.*, 70 Pa. St. 357. See also, *Filer v. New York Cent. R. Co.*, 49 N. Y. 47; *Phillips v. Rensselaer & S. R. Co.*, *Id.* 177.

A concise statement of the rule which has been favorably cited by the courts is:

“When a passenger is called upon to choose between two evils to which the neglect of the company has exposed him, one of which presents some degree of danger, but not such as he may not without imprudence encounter, if by adopting that alternative he suffers any injury, it is the proper subject for an action against the company.” *Kelly, C. B.*, in *Siner v. Great Western Ry. Co.*, L. R. 3 Exch. 150.

It is impossible to hold that the facts disclosed by the plaintiff's witnesses bring his case within the rules announced. On the contrary, we think it affirmatively appears from his own evidence that the want of due prudence upon his part was the proximate cause of the injury complained of. The motion for non-suit, therefore, should have been sustained. *Behrens v. Kansas Pac. Ry. Co.*, 5 Colo. 400; s. c. 8 Am. & Eng. R. R. Cas. 184. When the testimony on the part of the defendant is considered, the circumstances are still more unfavorable to the cause of the plaintiff. The train-men all concur that the swinging of the lantern was not seen at all, and that no stop signal was sounded, such a signal being two short blasts of the steam-whistle. They further state that Divide, up to that time, was used as a flag station, and not as a regular passenger station. The conclusion upon the whole case is inevitable that the plaintiff, knowing the danger of his position, failed to exercise ordinary prudence, and for that reason is not entitled to recover. Even if recovery could be sustained, the damages awarded are manifestly excessive, and the judgment would have to be reversed for that reason alone. As to the instructions, it is only necessary to say that in so far as they are inconsistent with the views above announced, they are held to be erroneous.

Judgment reversed.

Getting Upon Moving Cars Amounts to Contributory Negligence.—The conduct of a passenger in running after or alongside of a train which has attained a considerable degree of speed, and attempting to climb on board of it, is such contributory negligence as will defeat an action for damages in case of injury. *Chicago & N. W. R. Co. v. Scates*, 90 Ill. 586; *Knight v.*

Pontchartrain R. Co., 23 La. Ann. 462; Hubener v. New Orleans, etc., R. Co., 23 La. Ann. 492; Phillips v. Rensselaer, etc., R. Co., 49 N. Y. 177; Harper v. Erie R. Co., 32 N. J. L. 88; Wabash, etc., R. R. Co. v. Rector, 9 Am. & Eng. R. R. Cas. 264.

But see Johnson v. Westchester, etc., R. Co., 70 Pa. St. 357; Swigert v. Hannibal & St. Joe R. R. Co., 75 Mo. 475; s. c. 9 Am. & Eng. R. R. Cas. 322; Kelley v. Chicago, M. & St. P. R. Co., 2 Am. & Eng. R. R. Cas. 65; McCorkle v. Chicago, R. L. & P. R. Co., 18 Am. & Eng. R. R. Cas. 156.

HATFIELD

v.

ST. PAUL & D. R. CO.

(*Advance Case, Minnesota, January 21, 1885.*)

In an action for personal injuries the court has the power, in a proper case, and under proper circumstances, to require the plaintiff to perform a physical act in presence of the jury that will show the nature and extent of his injuries. But the propriety of doing so in a given case rests largely in the discretion of the trial court.

In this case the *uncontradicted* evidence of a number of witnesses showed that since receiving the injury complained of, the plaintiff was lame, and "limped" when she walked. *Held*, not error for the court to refuse to require her to walk across the court-room in presence of the jury.

APPEAL from an order of the District Court, Ramsey county.

O'Brien & Wilson, for respondent.

James Smith, Jr., and *I. V. D. Heard*, for appellant.

MITCHELL, J.—We have examined all the evidence in this case, and are of opinion that it justified the verdict.

The plaintiff, while leaving defendant's cars, fell or was thrown from the platform or steps of the car upon the ground, injuring the sciatic or great nerve of the thigh. The plaintiff, as a witness in her own behalf, testified that this had caused her great and constant pain, and had caused the thigh to shrink and had rendered her lame, and had caused her to "limp" in walking. The counsel for defendant requested the court to direct her to walk across the court-room in presence of the jury, which the court declined to do, to which refusal defendant excepted.

As the object of all judicial investigations is, if possible, to do exact justice and obtain the truth in its entire fullness, we have no doubt of the power of the court in a proper case to require the party to perform a physical act before the jury that will illustrate or demonstrate the extent and character of his injuries. This is in accordance with analogous cases in other branches of the law. When a view of real estate will aid the jury in reaching a conclusion, it is within the discretion of the court to permit it. When an inspection of an article of personal property will aid them, it is

not infrequent to cause the article to be brought into court for the same purpose. *Line v. Taylor*, 3 Fost. & F. 731; *Lewis v. Hartley*, 7 Oar. & P. 405. The practice in patent and in certain equity cases, of allowing tests to be applied before the court, is somewhat analogous in principle. So is the practice of divorce courts, of ordering an examination of the person of the party in certain cases.

It is a common practice to allow plaintiffs, in actions for personal injuries, to exhibit to the jury their wounds in order to show their extent, or to enable a surgeon to demonstrate their nature and character. This has been held proper. *Mulhado v. Brooklyn City R. Co.*, 30 N. Y. 370. If for these purposes a plaintiff may exhibit his injuries, there would seem to be no reason why, under proper circumstances, he may not be required to do the same thing, for a like purpose, upon request of the defendant. In some cases it has been held that a party may be required to submit to an examination by competent professional men for the purpose of ascertaining the nature and extent of his injuries. *Schroeder v. Chicago, R. I. & P. R. Co.*, 47 Iowa, 375; *Atchison, T. & S. F. R. Co. v. Thul*, 29 Kan. 466; s. c. 10 Am. & Eng. R. R. Cas. 783. From analogy to such cases, we conclude that a court has the power, in a proper case and under proper circumstances, to direct the plaintiff to do a physical act in presence of the jury that will illustrate or show the character of his injuries. And we are by no means prepared to say that there may not be circumstances where the defendant would have a right to such an order. But it is evident, from the very nature of things, that the propriety of such an order must usually rest largely in the discretion of the trial court, and it would only be in case of a plain abuse of such discretion that we would interfere. In the present case, we think the court very properly refused to direct the plaintiff to exhibit herself to the jury and by-standers by walking across the room. Such an act would have furnished the jury little or no aid in determining the extent or character of her injuries. The only fact it could by any possibility have determined was whether or not she was lame or "limped," as she testified, in walking. But there was already ample and *uncontradicted* evidence of this fact. Her own evidence on the point was fully corroborated by that of three or four other witnesses, her neighbors or members of her family, who had seen her almost daily since the accident.

Order denying new trial affirmed.

General Reference.—In a suit for personal injuries it has been held admissible for the plaintiff to exhibit his wounds or other injuries to the jury. *Mulhado v. Brooklyn City R. Co.*, 30 N. Y. 370. In a proper case and in order to promote the ends of justice, the plaintiff in such suit may be compelled by the court to submit his injuries to the inspection of competent physicians named by the defendant. *Schroeder v. Chicago, R. I. & P. R. Co.*, 47 Iowa, 375; *Atchison, T. & S. F. R. Co. v. Thul*, 29 Kan. 466; s. c. 10 Am.

& Eng. R. R. Cas. 788; *Walsh v. Sayre*, 52 How. Pr. 834; *White v. Milwaukee City R. Co.*, 18 Am. & Eng. R. R. Cas. 213.

But such an order will not be made where there is already sufficient evidence on both sides. It will only be made when required fully to elucidate the question. *Loyd v. Hannibal & St. Joe R. Co.*, 53 Mo. 509; *Sioux City & Pacific R. Co. v. Finlayson*, 18 Am. & Eng. R. R. Cas. 68.

In view of the above authorities and in analogy to them, it would seem clear that the decision in the principal case is right.

INTERNATIONAL & GREAT NORTHERN RY.

v.

IRVINE.

(*Advance Case, Texas, December 9, 1884.*)

When, in an action by a passenger against a railroad company, the only allegation in the petition with respect to pain and suffering occasioned by injuries for which suit is brought, is "that in consequence of said injuries the plaintiff was confined to his bed under treatment of physicians for five or six weeks, and that he suffered painfully from said wounds," plaintiff cannot recover for mental suffering.

In suit for a personal injury, the physician attending the plaintiff cannot be asked his opinion as to the result if the treatment adopted by him had been continued by the physician succeeding him after he had abandoned the case, when such evidence does not go to show that the subsequent treatment rendered permanent the injury to the plaintiff.

F. B. Sexton, for appellant.

W. B. & G. G. Wright and *R. A. Stafford*, for appellee.

Statement.—Appellee sued the appellant for damages for personal injury caused by negligence of appellant and its servants and agents, alleging that about the 26th day of February, 1883, he paid the fare demanded of him by the conductor of appellant's train for a first-class seat on appellant's train from Tyler to Mineola; that appellant, through said conductor, received said fare, and thereby agreed to safely transport and deliver appellee at the passenger depot of appellant in Mineola; that appellant did not do this, but stopped its train a half mile from the depot, and the conductor of said train told appellee to get off, that the train would go no further; that it was night when the cars were stopped, and appellant, in getting off the train as ordered, could not see, fell and was injured. Appellee alleges that his left arm was fractured at the elbow joint; that his arm is now stiff, and in consequence of his said injuries he is a cripple for life; lays his damages at \$20,000.

Appellant pleaded general demurrer and general issue; also alleged contributory negligence of appellee, without which he would not have been injured; and that appellee got off the cars of appellant, of his own volition, sooner than was necessary, knowing that

the train had not reached the depot at Mineola, but that the locomotive pulling the train had been detached temporarily in order that different cars (the train being a freight train, as well known to appellee) might be moved to their proper places, and that had appellee remained on the cars a few minutes longer, he would have been taken to the depot; that this was customary with the train on which appellee was traveling on its arrival at Mineola, and this custom was known to appellee; that appellee was intoxicated, and by his own recklessness and carelessness brought his injury on himself, etc.

A trial of the cause resulted in a verdict and judgment for \$8,000 against appellant, from which this appeal is taken.

WATTS, J., adopted.—This is an action resulting from personal injuries, and the only allegation in the petition with respect to pain and suffering occasioned by the injuries, is as follows: "That in consequence of said injuries he was confined to his bed under treatment of physicians for five or six weeks; that he suffered painfully from said wounds." Upon the trial the court instructed the jury that, in estimating the damages, to consider the physical and mental pain and suffering occasioned by the injury. Appellant claims that there is no allegation in the petition which would authorize a recovery for mental suffering, and that, therefore, the charge is erroneous and misleading.

In *T. & P. R. R. Co. v. Durrett* (57 Texas, 53) it is said, "Under the general statement of the grounds of injury, the same being sufficiently specific under the general claim for damages, all things which were the natural result of the act made the basis for damages, could properly be proved."

It is a familiar doctrine, and one well established by adjudicated cases, that general damages are such as necessarily result from the injury complained of, and are recoverable under the general allegation of damage without being specifically alleged. But such damages as are the natural, but not the necessary, result of the injury, are special and must be specifically alleged before a recovery can be had therefor.

A party who inflicts an injury is held to a knowledge of all damages that necessarily flow from the injury, and of these he is sufficiently notified by the general allegations of damages; whereas such damages as are not the necessary sequence of the act must be specially alleged so as to prevent a surprise upon the defendant. *Bristol, etc., Co. v. Gridley*, 28 Conn. 201; *Vanderstice v. Newton*, 4 N. Y. 130; *Baldwin v. N. Y. Nav. Co.*, 4 Daly N. Y. 314; *Burrell v. N. Y. & S. S. Co.*, 14 Mich. 34; *Lewis v. Paull*, 42 Ala. 136; *Lindsey v. Dempsey*, 45 Ind. 247; *Gay v. Winter*, 34 Cal. 153; *Herin v. McCaughan*, 32 Miss. 17.

It is also well settled that in actions for personal injury the com-

pensatory damages recoverable, besides pecuniary loss, also include compensation for physical pain and mental suffering. *Hamilton v. Third Ave. R. R. Co.*, 53 N. Y. 25; *Craker v. Chicago, etc., R. R. Co.*, 36 Wis. 637.

While mental anguish or pain may naturally result from a personal injury, it is not the necessary sequence of the injury. From contusions, bruises and wounds inflicted upon the person, physical pain is not only the natural, but often the necessary, result or sequence. So the circumstances accompanying a personal injury might be such as to show that it was done with the intention to degrade or humiliate, vex or insult the party, and it might be claimed with some show of reason that the mental suffering would necessarily result from the injury; however, we are not called upon to decide that point, as no such circumstances attended the injury complained of in this case.

Here mental suffering might or might not have resulted from the injury; such suffering may have been the natural, but it was certainly not the necessary, consequence of the act resulting in the asserted injury. Therefore, under established rules of law, to authorize a recovery for such special damages, they must be specifically alleged. And the allegation that appellee "suffered painfully" from the injury, while sufficient to authorize a recovery for physical pain, would not, upon any reasonable construction of the allegation, embrace or include mental suffering.

While appellee in his testimony says that he suffered pain, and still so suffers from the injury, yet it would seem that he had reference to physical and not mental suffering. The rule with us is, that the charge of the court must agree with the allegations and proof; and it is generally considered ground for reversal to submit to the jury an issue upon which there has been no evidence adduced, or to charge upon an issue not made by the pleadings. *Markham v. Carothers*, 47 Texas, 22; *Smith v. Montes*, 11 Texas, 24; *Austin v. Talk*, 20 Texas, 164; *Andrews v. Smithwick*, *Idem*, 111.

Such errors in the charge, while generally considered grounds for reversal of the judgment, still, when it clearly appears from the record that the party complaining was not injured thereby, the errors will be considered and treated as immaterial. Considering the nature of the case, and the manner in which it is presented by the pleadings, and submitted by the charge, we cannot with any degree of certainty determine that no injury resulted to appellant from the error in the charge.

It is claimed that the court erred in refusing to allow the witness, Dr. A. Patten, to answer the following questions propounded by appellant, to wit: "If the plaintiff had pursued the treatment of his arm which you directed when he left Mineola, and had not changed said treatment or had the same changed by applying the

plaster of Paris dressing which he told you was applied after he got to Dallas, would he or not, in your opinion, have regained the full use of his arm?"

This witness was one of the physicians who attended appellee immediately after the injury was received, and he had fully stated his opinion as to the character of the injury, etc., as to its being permanent or transitory in its effects, and it seems very clear that the evidence sought to be elicited by the question would not in any way tend to establish or refute any issue in the case. It did not tend to show that the injury was rendered permanent by the malpractice of the physician at Dallas, independent of that inflicted by the appellant as claimed by appellee. *Pierce on Railroads*, 304; *Cooley on Torts*, 683; 2 *Thomson on Neg.* 1091.

Other errors assigned need not be considered; the rules of law applicable to the issues presented are well settled by many adjudicated cases in our own reports. In our opinion the court erred in the charge as noted above, and should have granted the motion for a new trial. Wherefore, the judgment is reversed and the cause remanded.

Reversed and remanded.

Damages for Mental Pain and Anguish.—It is held by some authorities that in case of personal injuries, damages are recoverable for mental pain and anguish as distinguished from physical suffering. *Paine v. Chicago, etc.*, R. Co., 45 Iowa, 569; *Chicago, etc., R. Co. v. Flagg*, 43 Ill. 364; *McKinley v. Chicago, etc., R. Co.*, 44 Iowa, 314; *Craker v. Chicago, etc., R. Co.*, 36 Wisc. 657; *Sherley v. Billings*, 8 Bush, 147; *Seeger v. Burkhamstead*, 22 Conn. 290; *Masters v. Warren*, 27 Conn. 293; *Canning v. Williamstown*, 1 Cush, 451; *Hamilton v. Third Ave. R. Co.*, 53 N. Y. 25; *Quigley v. Central Pac. R. Co.*, 11 Nev. 350; *Stewart v. Ripon*, 38 Wisc. 587; *Penna., etc., Canal Co. v. Graham* 63 Pa. St. 290; *Cooper v. Mullins*, 30 Ga. 152; *Ware v. St. Paul Water Co.*, 1 Dill. 465; *Indianapolis, etc., R. Co. v. Stables*, 62 Ill. 313; *Wright v. Compton*, 53 Ind. 337; *Peoria Bridge Assn. v. Loomis*, 20 Ill. 236; *Oliver v. La Valle*, 36 Wisc. 598; *Porter v. Hannibal & St. Geo. R. Co.*, 2 Am. & Eng. R. R. Cas. 44; *Houston & T. C. R. Co. v. Rand*, 9 Am. & Eng. R. R. Cas. 399; *Dawson v. Louisville & N. R. Co.*, 11 Am. & Eng. R. R. Cas. 134; *Klutts v. St. Louis*, 1 Mt. & Southern R. Co., 11 Am. & Eng. R. R. Cas. 639; *International & Gt. Northern R. Co. v. Kentle*, 16 Am. & Eng. R. R. Cas. 337.

According to some authorities, however, no damages are recoverable for mere mental pain or anguish. Such damages are held to rest upon too hypothetical a basis. *Smith v. Pittsburgh, etc., R. Co.*, 23 Ohio St. 10; *Johnson v. Wells*, 6 Nev. 224; *Batterson v. Chicago, etc., R. Co.*, 8 Am. & Eng. R. R. Cas. 123.

CENTRAL RAILROAD OF GEORGIA

v.

COMBS *et al.*(70 *Georgia Reports*, 533.)

A railroad company which sells and issues tickets to passengers over its own lines of road and lines of road of other companies (known as through tickets), is liable for the sure and safe transportation of such passengers to the point of destination, notwithstanding there may be indorsed or printed on the tickets so sold and issued a notice that the company issuing and selling such tickets shall not be liable, except as to its own lines of road.

The agent of a railroad in Atlanta, Georgia, sold to a passenger a ticket to Galveston, Texas (to which point it was guaranteed he could go), by way of his own road and connecting roads to New Orleans, and thence by the Morgan line of steamers to Galveston, and upon the arrival of the passenger in New Orleans he found that the steamers on the Morgan line had been taken off; if there were other routes to his destination open to him, the measure of damages which he could recover against the road issuing the ticket would be what it would have cost him to have reached his destination by other means and routes than the Morgan line, including reasonable pay for delays; and it might include, also, such special damages as the party may have sustained by reason of such delay.

If it should appear that no quarantine existed when the ticket was sold, and that, subsequently to the purchase, the Morgan line of steamers was withdrawn, in consequence of the prevalence of yellow fever in New Orleans, then the purchaser would not be entitled to recover anything.

If the steamers had been withdrawn when the ticket was purchased, and the purchaser proceeded to New Orleans, and there was no other convenient and expeditious way, then the measure of damages would be the expenses of the purchaser from Atlanta to New Orleans and back, expenses while there, necessary expenses on the road, and the loss of time in making the passage there and back.

REPORTED in the decision.

Lyon & Gresham, for plaintiff in error.

Bacon & Rutherford, by brief, for defendants.

BLANDFORD, J.—The defendants in error brought their separate actions in the superior court of Bibb county against the plaintiff in error, in which each alleged that he made a contract with the defendant (the plaintiff in error), that for and in consideration of the sum of thirty-five 55-100 dollars, it would transport the plaintiff from the city of Macon, Georgia, to the city of Galveston, Texas; that he paid said amount to defendant, and that defendant issued and delivered to plaintiff a ticket, with certain coupons attached; that plaintiff traveled and was transported on said ticket as far as the city of New Orleans; that part of the ticket so purchased was over the Morgan line from New Orleans to Galveston; that he left the city of Macon on the 20th of August, 1879, and followed the directions given him by defendant, reaching New Orleans on the

21st of August, 1879, and there the defendant failed and refused to carry him farther on his journey, and the Morgan line failed and refused to carry plaintiff from New Orleans to Galveston. And it was further averred that there was no steamer running on the Morgan line from New Orleans, and had not been for a long time before the issuing of said ticket and the making of the contract, and that fact defendant knew before it sold the ticket. These are all the allegations in the declaration material to be considered by this court.

The defendant in the court below and plaintiff in error in this court filed a plea of the general issue.

The plaintiff, Combs, was sworn as a witness in behalf of plaintiffs, and he testified that he wanted to go to Texas for the purpose of buying ponies or horses, in the summer or winter of 1879, and that he and Richards went to the Central Railroad depot in Macon, and asked the ticket agent as to which was the best way to get to Galveston, and whether they could get tickets to go through on. "He told us he could sell us tickets by way of New Orleans to Galveston, and did sell one to witness and Richards for thirty-five dollars each." Witness identified two tickets shown him, and said that "these are parts of the two tickets sold to us by the agent of the Central Railroad," and were the parts they were not able to use. They started to Galveston on the tickets which they bought, and went as far as New Orleans; and when they arrived there and presented the tickets, the agent of the Morgan line of steamers informed them the steamers were not running. "When we found we could not go on to Galveston, we stayed in New Orleans two days and nights, and then returned to Macon. We paid two dollars a day for board each day we stayed in New Orleans, and we paid twenty-four dollars each for tickets back to Macon," sixteen dollars each for expenses on the road there and back; their time was worth each ten dollars per day; that they were gone six days. Upon cross-examination, stated that ticket agent did not say anything to him about not being able to go to New Orleans by Memphis, but heard some conversation between him and Mr. Richards about going by Memphis, but do not know what it was. Did not hear Mr. Hoge, the agent, say he could not sell us tickets by way of Memphis, on account of yellow fever being there, and the tickets had been taken off of sale; nor did I hear him say he did not know whether we could get through New Orleans or not, as he had not been officially notified to take the tickets off sale. Does not remember what month this occurred in, but thinks it was in the winter time. On looking at the date of the ticket, said it was in August, but afterwards said he thought it was in the winter time. His meals on the way to New Orleans cost fifty cents each; remembers no other item of expense going to make up the sixteen dollars, except prize candy and other such

things bought on the cars; was a horse drover, and was certain he could make ten dollars a day.

The plaintiffs introduced in evidence two coupons of tickets from New Orleans to Galveston, copy of which is as follows:

"Central Railroad of Georgia. First Class. Galveston, Texas, *via* C. of G., C. & W., W. of A., L. & N., T. M. L. T. Co. Issued by the Central Railroad of Georgia. Good for one first-class passage to Galveston, Texas, when officially stamped, and subject to the following contract: 1st—In selling this ticket, this company acts as agent, and is not responsible beyond its own line," etc.

Stamped on the back of each ticket and coupon:

"Central Railroad of Georgia. S. C. Hoge, agent. August 20, 1879."

The defendant introduced S. C. Hoge, who was sworn, and he testified that he was the agent of the Central Railroad at Macon; sold two tickets in August, 1879, to two men, who said they wanted to go to San Antonio, Texas, by way of Galveston; did not know whether plaintiff was one of the men, but these are the tickets which he sold; recognizes the stamps and remembers the date on them; it was in August, 1879. They asked witness if he could sell them tickets by Memphis to Galveston; he informed them he could not, as there was yellow fever there; the place was quarantined, and we had been notified to take the tickets off sale. He then asked witness if there was any other route they could get tickets, so as to go through on same tickets. Witness replied that he could sell them tickets through New Orleans, but he did not know whether they could get through or not, on account of the yellow fever being there. Witness knew that the yellow fever was there as well as at Memphis. Witness told them that he had not been notified to take the tickets off sale by that route, and, therefore, he had to sell them the tickets; but he did not tell them they could go through on the tickets; simply told them he was doubtful about it. Some time after this, the same men who bought the tickets came and demanded a refunding of their money, as they said they could not get through New Orleans on them; they were referred to Major Shellman.

Major N. T. Shellman was introduced and sworn as a witness for defendant, and he testified that he was the general agent of the Central Railroad at Macon, in 1879; he remembered the plaintiff coming to him to take up the coupons of the two tickets, and to reimburse them for their expenses in going and returning from New Orleans, as they had not been enabled to go further on account of the Morgan line of steamers being quarantined or stopped by the prevalence of yellow fever at New Orleans. Witness refused to pay them, and referred the matter to Mr. Smith, who had charge of the passenger business of the road.

A letter was received from Mr. Smith, and it was read to Combs, who seemed to be acting for himself and Richards. Witness proposed to pay twenty-five 50-100 dollars for the unused portion of the tickets, not because the road was bound, but in order to settle the matter. Combs refused to settle, and the suit was brought.

This is all the testimony submitted by the parties in this case; and as the cases of Combs and Richards were the same in all respects, by consent of the parties, the two cases were tried together, and a verdict was rendered in each case for the sum of one hundred and thirty-nine 55-100 dollars.

The defendant moved for a new trial on several grounds—

1. Because the court erred in charging the jury, "If you believe that, at the time the contract was made, these men were notified that they could not get through New Orleans to Galveston, and they agreed to take the risk to see whether they could go through or not, then they are not entitled to recover. It is for you to say whether that was the contract or not. If the agent of the railroad simply expressed a doubt as to their getting through, and they did not agree to take the risk, then the railroad is still liable for the actual damages, whatever they may be."

2. Because the court erred in charging the jury as follows: "I charge you they are entitled to recover expenses from here to New Orleans and back, expenses while there and necessary expenses on the road, also to recover the loss of time in making passage there and back."

3. Because the jury found contrary to the following charge: "If you believe these men made this contract with the railroad company, or its agents in Macon, for the sale of tickets, and they agreed to transport them from Macon to Galveston, then the railroad is bound to do so, unless from providential cause or something of that sort, and if they did not do it, then the plaintiffs are entitled to recover the actual damage which they have sustained by reason of the railroad company not having complied with its part of the contract."

4. Because the jury found contrary to the evidence and against the weight of evidence.

5. Because the jury found contrary to law and the equity and justice of the case.

The court overruled the motion for a new trial, and error to this court is assigned upon exceptions to this ruling.

There are several questions made by this record. First, is a railroad company which sells and issues tickets to passengers and persons over its own lines of road and the lines of road of other companies, known as through tickets, liable for the sure and safe transportation of such passengers or persons to the point of destination, notwithstanding there may be endorsed or printed on the

tickets so sold and issued, "that the company issuing and selling such tickets shall not be liable except at to its own line of road?" It has been held by this court that, when a passenger with a through ticket over a connecting line of railroads checks his baggage at the starting point through to his destination, and upon arriving it is damaged and has been broken open and robbed, he may sue the road which issued the check, or he may sue the road delivering the baggage in bad order. *Wolff v. Central Railroad Company*, 68 Ga., 653; s. c. 6 Am. & Eng. R. R., Cas. 441; *Hawley v. Screven et al.*, rec'rs, 62 Ga., 347. In 2 Redfield on Railways, p. 292, Sec. 201, it is stated "that taking pay and giving tickets or checks through for the carriage of baggage of passengers, binds the first company, ordinarily, for the entire route." Yet this author, who cannot be considered as having any bias or prejudice against these corporations, does not assign any reason for the *dictum* above. He contents himself with citing the case of *McCormick v. Hudson River Railway*, 4 E. D. Smith, 181.

It may be very safely assumed from these decisions that the law of this State is that, when a railroad company issues and sells a ticket over its own lines of road, and over the lines of other roads to a point designated, such company is liable to the passenger thus purchasing such ticket, who checks his baggage through on the line indicated in the ticket, for the safe and secure carriage and transportation of such baggage. And if the railroad company would be liable for the safe and secure transportation of the baggage of a passenger, which is but a convenience and incident of the passenger, it cannot be very readily perceived why such company should not be liable for the safe and secure carriage and transportation of the passenger himself. Why is the company thus contracting liable for the transportation of the passenger's baggage? Is it not because such is the undertaking of such company?

In the case of *Illinois C. R. R. v. Copeland*, 24 Ill., 338, the Supreme Court of that State say this: "We hold the ticket and the check given by this company, and produced in evidence, imply a special undertaking to carry the passenger to St. Louis, via the Terre Haute and Alton Railroad, and his baggage also. The ticket is what is known as a through ticket, and the check denotes that the baggage is checked from Chicago to St. Louis, and both inform the passenger that the Illinois Central has running connections with the Terre Haute and Alton road, and that they can and will deliver the passenger and baggage, by means of this connection, at St. Louis. The ticket and check are both issued by the Illinois Central; they are the evidence of the contract made with them, and, in effect, speak this language: 'If you will buy this ticket, we will carry you safely to St. Louis, and your baggage also; the terminus of our road, by means of our connection with

Terre Haute and Alton Road, is at St. Louis, and we guarantee to you your safe arrival there with your baggage * * * * whether we run our own cars through or take those of the other road at the point of intersection. You pay through, and you and your baggage shall be carried through.' This is the contract evidenced, we think, by the ticket and check." What a close analogy between the case under consideration and the Illinois case above cited! And the reason for the rule is well stated. You pay your money to go through, and the company receiving it guarantees to you that you shall go through safely; it is an implied special contract, and it is not limited by any statements written or printed on the check or ticket not signed by the passenger. In support of this doctrine, see *Quimby v. Vanderbilt*, 17 N. Y., 306; also *Kessler v. N. Y. C. R. R.*, 7 Lansing, N. Y., 62. Code of Ga., Sec. 2,068.

There is no error in the several rulings of the court below, except as to the rule given in charge to the jury upon the measure of damages in this case. The court instructed the jury that, if the plaintiffs were entitled to recover, they could recover the passage money from Macon to New Orleans and back, expenses in New Orleans, and expenses on the passage and reasonable compensation for the time employed in the journey. This is not the correct rule of damages in this case. It is not shown by plaintiffs that they made any attempt to reach Galveston, except by the Morgan line of steamers; and it does not appear that there was no other means by which they could have reached Galveston, the point plaintiff in error had guaranteed they should go. The declaration of plaintiffs does not so state, but avers the steamers on the Morgan line had been taken off. It may be there were other routes open at the time; and in such case the measure of damages would be what it would have cost them to have reached their destination by other means and other routes than the Morgan line of steamers, including reasonable pay for delays; and it might be also for such special damage the party may have sustained by reason of such delay. This would have been the proper measure of damages under the facts in this case. If it should appear upon another trial that no quarantine existed when the tickets were sold, and that, subsequent to the purchase of the tickets by defendants in error, the Morgan line of steamers were withdrawn, in consequence of the prevalence of yellow fever in New Orleans or elsewhere, then the plaintiffs in the court below would not be entitled to recover anything. If, however, it shall be made to appear on the next trial that the steamers had been withdrawn when they purchased their tickets, and they proceeded to New Orleans on their journey, and there was no other convenient and expeditious way by which they could reach Galveston, then they would be entitled to their expenses, and the rule

given by the court below as to the measure of damages would be applicable.

Judgment reversed.

Railroad Company Selling Through Ticket Liable Beyond its Own Line.—In some States it has been held that when a railroad company sells a ticket over connecting roads to a point beyond its own line, it is liable for the performance of the contract of transportation through to the point of destination. It must therefore respond in damages in the event of the injury or delay of a passenger before reaching his destination at some point beyond its own line. *Candee v. Pennsylvania R. Co.*, 21 Wis. 582; *Weed v. Saratoga, etc., R. Co.*, 19 Wend. 534; *Illinois, etc., R. Co. v. Copeland*, 24 Ill. 337; *Nagat v. Boston, etc., R. Co.*, 7 Allen, 329; *Croft v. Baltimore, etc., R. Co.*, 1 McArthur, 492; *Burnell v. New York, etc., R. Co.*, 45 N. Y. 184; *Ward v. Vanderbilt*, 4 Abb. App. Dec. 421; *Williams v. Vanderbilt*, 28 N. Y. 217; *Wilson v. Chesapeake, etc., R. Co.*, 21 Gratt. 654; *Carter v. Peck*, 4 Sneed, 202; *Quimby v. Vanderbilt*, 17 N. Y. 306; *Hart v. Rensselaer, etc., R. Co.*, 19 Wend. 534; *Cary v. Cleveland R. Co.*, 29 Barb. 85.

Such is the effect of the English authorities. *Kent v. Midland R. Co.*, L. R. 10 Q. B. 1; *Great Western R. Co. v. Blake*, 7 H. & N. 986; *Mytton v. Midland R. Co.*, 4 H. & N. 614; *Buxton v. North Eastern R. Co.*, L. R. 3 Q. B. 549.

Railroad Company may Bind Itself by Contract to Transport Passenger Beyond its own Line.—Railroad companies have in some cases attempted to set up the defence of *ultra vires*. This defence has not, however, been favorably received. It is usually held that railroad companies have power to contract to carry passengers beyond their own lines. *Wheeler v. San Francisco, etc., R. Co.*, 31 Cal. 46; *Nashville, etc., R. Co. v. Sprayberry*, 9 Heisk. 852; *Cary v. Cleveland R. Co.*, 29 Barb. 85; *Candee v. Penna. R. Co.*, 21 Wis. 582; *Wilson v. Chesapeake, etc., R. Co.*, 21 Gratt. 654.

And see *Bissell v. Michigan, etc., R. Co.*, 22 N. Y. 258; *Buffett v. Troy, etc., R. Co.*, 40 N. Y. 168.

Authorities Denying the Existence of Extra Terminal Liability on Through Ticket.—According to some authorities, where a coupon ticket is issued in the usual form over several connecting roads, the contract of transportation over each road is separate. The company selling the ticket is not therefore responsible for injuries or detentions occurring beyond its own line. *Hood v. New York, etc., R. Co.*, 22 Conn. 1; *Knight v. Portland, etc., R. Co.*, 56 Me. 235; *Nashville, etc., R. Co. v. Sprayberry*, 9 Heisk. 852; *Fustenheim v. Memphis, etc., R. Co.*, 9 Heisk. 238; *Pennsylvania R. R. Co. v. Connell*, *supra*.

When Passenger Holds Through Ticket, Company in Fault is Liable for Injuries.—In any event, if a party buying a ticket such as above described is injured at some point beyond the line of the company from whom he bought the ticket, he may elect to sue the company through the fault of which he has been injured. *Chicago, etc., R. Co. v. Fahey*, 52 Ill. 81; *Schopman v. Boston, etc., R. Co.*, 9 Cush. 24; *Glasco v. New York, etc., R. Co.*, 36 Barb. 557.

JOHNSON

v.

PHILADELPHIA, WILMINGTON & BALTIMORE RAILROAD CO.

(*Advance Case, Maryland, 1884.*)

Plaintiff bought an excursion ticket at a reduced rate, which contained on its face the stipulation that it was good only for a continuous trip

between the points named, and attempted to use it on a train that did not make the whole trip, and was put off the train.

Held, that since the ticket was bought at a reduced rate and accepted, the purchaser was bound by the stipulations on its face, and was properly ejected from a car on which the ticket did not entitle him to ride.

Constable & Warburton, for plaintiff in error.

Jones & Evans, for defendant in error.

MILLER, J.—This suit was brought by the appellant against the appellee to recover damages for having been wrongfully ejected from its cars. The declaration alleges that on the 23d of May, 1883, the plaintiff purchased from the defendant an excursion ticket from Elkton to Philadelphia and return, whereby the defendant became bound to carry him safely over its road on this trip, and treat him civilly and properly, but the defendant had rude and incompetent servants on the train and in charge thereof, who refused to allow him to ride on its road, dragged him from his seat, expelled him from the train, and other wrongs to the plaintiff then and there did.

Instead of meeting this simple case with the plea of *non cul*, and trying it upon issue joined on that plea, the docket entries show there was an extraordinary number of special pleas and replication, a part of which only are contained in the record. It contains only four lengthy pleas and five similar replications, to which numbers they had been reduced by the withdrawal of the others, there having been originally eight pleas and many more replications. The court overruled the demurrers to these four pleas, sustained the demurrers to the five replications and gave judgment for the defendant, from which the plaintiff has taken this appeal. From this we infer, though it is not so stated in the record, that the plaintiff did not wish to amend or answer over, and was willing that final judgment should be given for the defendant, relying upon the success of his effort to reverse the ruling of the court upon these demurrers.

It is, therefore, our duty to pass upon the sufficiency of these pleadings, but before examining them, it becomes important to ascertain the rights and obligations of the plaintiff under the ticket which he purchased.

This ticket is set out *verbatim*, twice in the pleas and once in the replications, and it consists of two connected parts, on the first of which there are printed below the name of the defendant the terms "Excursion—Elkton to Philadelphia—subject to conditions named in contract. Not good to stop off." And on the second, also below the name of the defendant, the terms, "Three days' excursion. Return coupon. Philadelphia to Elkton;" and then follows this contract: "In consideration of the reduced rate at which this ticket is sold, it is agreed that it shall be used within

three days, including the day of sale as stamped on the back, for a continuous trip only, and by its acceptance the purchaser becomes a party to and binds himself to a compliance with these conditions. It is not transferable nor good to stop off."

We find no difficulty in construing this contract. The conditions that the ticket shall be used "for a continuous trip only, and is not good to stop off," means that a purchaser who accepts and uses it is bound to take a train which will carry him continuously through, from one city to the other, both in going and returning, and not to stop off at an intermediate station while going either way, and the obligation of the company is to carry him safely and to furnish trains which will thus carry him continuously from one place to the other.

In *Pennington v. Phila., Wil. & B. R. R. Co.*, *supra*, the party attempted to use the return coupon of similar ticket after the expiration of the three days, and it was held that the limitation as to time was good and binding upon him, notwithstanding there was proof that he never read the ticket, and that the agent who sold it to him told him it was "good until used."

In that case we decided that where a ticket is sold at less than the usual rates, on certain conditions as to its use, if the purchaser accepts and uses it, he makes a contract with the company according to the terms stated, and the reduction in the fare is the consideration for his contract; and that after he has availed himself of this reduction by using the ticket to make the trip one way, it is too late for him, on his return, to allege that he did not know on what terms the reduction was made, when he had ample opportunity of learning them from the ticket in his possession. According to the law thus stated, the plaintiff was bound to observe all the conditions expressed on the face of his ticket, and could not hold the defendant to any other terms than those thus stated; and this being so, there is not much difficulty in disposing of these pleadings.

The substantial averments of the pleas are that the plaintiff purchased and accepted this ticket, and on the same day took passage on a train which carried him directly through from Elkton to Philadelphia, and on this side gave up to the conductor the first part of his ticket; that on the next day at Philadelphia he got on a train which did not run as far as Elkton, and was only intended and advertised to run to Wilmington, all of which he well knew at and before the time he entered said train; that he, moreover, entered this train with the purpose and intention, not to make a continuous trip to Elkton, but to stop off at an intermediate station; that after the train had started, and before it had reached South street station in Philadelphia, the plaintiff, on demand of the conductor, showed him for his passage the return coupon of this excursion ticket, and announced his intention not to make a

continuous trip to Elkton, but to stop off at an intermediate station and to use this coupon for that purpose; that the conductor thereupon informed him that this coupon was not good for that train, which ran only to Wilmington, nor for the purpose of stopping off, and told him he must pay his fare or produce a proper ticket to the station he intended to stop at, which he refused to do; that the conductor then told him if he would neither pay his fare nor produce a proper ticket, he must leave the train at South street station, and when the conductor gently laid his hands upon him to remove him at that station, he resisted violently, rendering it necessary for other agents to be called to assist the conductor, and they put him off, using no more force than was absolutely necessary to overcome his resistance and effect his removal.

Now, in view of what we have already said as to the binding effect of the conditions attached to this ticket, it is plain that the facts thus stated in these pleas afford a complete defense to the case made by the declaration. The question then is, do the replications set out a sufficient answer to this defense? The replications fail to traverse any of the facts stated in the pleas, and the plaintiff is, therefore, held to the admission that they are true, under the rule that every pleading is taken to confess such traversable matters alleged on the other side as it does not traverse. Stephen's Pl. 216.

The only answer to these admitted facts, made by the replications and relied on by the appellant's counsel in their brief, is what is stated in two of them, and this, as to the first, is substantially as follows: That the defendant had established at its Broad street station in Philadelphia a system for the management of its passenger traffic, by which passengers were not allowed to act on their own judgment in getting on the cars, but the defendant itself undertook, by means of its agents, called gatekeepers, to assign passengers holding tickets to the proper train; that plaintiff wishing to return towards Elkton to Chester, a station on defendant's road between Philadelphia and Wilmington, went to one of these gatekeepers, who examined his ticket and negligently assigned him to the wrong train. The other states substantially the same facts, and alleges that it was the duty of the gatekeepers to inspect the tickets of all passengers, and in case a passenger held a ticket which the agent believed entitled him to a ride on the train about to be despatched, to admit such person through the gate and into the train as a passenger thereon; that the gatekeeper inspected plaintiff's ticket, and, believing him entitled to ride on the train then about to be despatched, admitted him into said train as a passenger thereon.

This is all that the plaintiff has to set up as an excuse for violating his contract with the defendant company, by getting on to a train which he knew, at and before the time he boarded it, did

not run through to Elkton, and with the purpose and intention of stopping off at an intermediate station. All that need be said of such an excuse is, that while it is similar it is not so strong as that which was relied on without avail in Pennington's case. There the agent who sold the ticket told the plaintiff that it was "good until used," and to that our reply was that there was no evidence that the ticket agent was authorized to make or to vary the terms of contracts for the company, and our reply here is that there is no averment in these replications that the gatekeepers had any such authority or power. In that case there was proof that the plaintiff did not actually read his ticket, but there is no averment to that effect in behalf of the plaintiff in this case, and it would not have availed him if he had made it. He cannot get rid of the conditions of his contract by saying that he relied upon the actual or implied direction to take this train, which was given either through the belief of the gatekeeper that the ticket was good for the train, or through his negligence, ignorance or mistake. The contract could not be varied by any such direction. He knew, or was in law presumed to know, what the contract was, and he boarded a train which he knew would not take him to Elkton, and that, too, with the deliberate purpose of violating another condition of his contract by stopping off at Chester; and we have no difficulty in deciding that the conductor properly ejected him from a train upon which he had no right to be except upon the condition of paying his fare to the place he intended to stop at.

The court was clearly right in sustaining the demurrer to these replications, and the judgment must be affirmed.

Passenger with Ticket for Continuous Passage Cannot Stop Over.—When a passenger buys from a railroad company a ticket entitling him to a continuous passage between two points, he is only entitled to such continuous passage and has no stop over privileges. *Johnson v. Concord R. Corp.*, 46 N. H. 218; *Stone v. Chicago, etc., R. Co.*, 47 Iowa, 82; *Cheney v. Boston, etc., R. Co.*, 11 Metc. 121; *Terry v. Flushing, etc., R. Co.*, 13 Hun, 359; *Breen v. Texas, etc., R. Co.*, 50 Tex. 48; *Drew v. Central Pacific R. Co.*, 51 Cal. 425; *Dumphy v. Erie R. Co.*, 10 J. & S. 128; *Oil Creek, etc., R. Co. v. Clark*, 72 Pa. St. 241; *Gale v. Delaware, etc., R. Co.*, 7 Hun. 670; *Beebe v. Ayers*, 28 Barb. 275; *State v. Overton*, 24 N. J. L. 435; *Hamilton v. New York, etc., R. Co.*, 51 N. Y. 100; *Briggs v. Grand Trunk R. Co.*, 24 Upp. Can. Q. B. 510; *Craig v. Great Western R. Co.*, 24 Upp. Can. Q. B. 504; *State v. Overton*, 24 N. J. L. 435; *Vankirk v. Penna. R. Co.*, 76 Pa. St. 66; *Dietrich v. Penna. R. Co.*, 71 Pa. St. 432; *Petrie v. Pennsylvania R. R. Co.*, 1 Am. & Eng. R. R. Cas. 258; *Carpenter v. Grand Trunk R. Co.*, 3 Am. & Eng. R. R. Cas. 432; *Yorton v. Milwaukee, etc., R. Co.*, 6 Am. & Eng. R. R. Cas. 323; *Hatton v. Railroad Co.*, 13 Am. & Eng. R. R. Cas. 53; *Walker v. Wabash, etc., R. Co.*, 16 Am. & Eng. R. R. Cas. 380.

When, by the terms of the ticket, the holder is entitled to a continuous passage, it is sufficient that the passenger begins the journey at an intermediate point. *Auchbach v. New York Central R. Co.*, 6 Am. & Eng. R. R. Cas. 334.

Passenger is only Entitled to Ride in Train Going to and Stopping at

Point Named in Ticket.—Where a passenger's ticket reads to a certain point, he is only entitled to ride upon a train going to and stopping at that point. *Beauchamp v. International, etc., R. Co.*, 9 Am. & Eng. R. R. Cas. 307.

LUNDY

v.

CENTRAL PACIFIC RAILROAD COMPANY.

(*Advance Case, California, December 8, 1884.*)

A railroad ticket entitling the purchaser to a continued passage between two given points, if used within a certain time, is good for such continued passage if the same be commenced within the time limited.

Contract for carriage of a passenger construed, and *held* to be a contract made by another carrier for and by authority of the defendant carrier, and action, therefore, properly brought against defendant for breach thereof.

APPEAL from a judgment of the Superior Court for the city and county of San Francisco, entered in favor of the defendant, and from an order denying the plaintiff a new trial. The opinion states the facts.

W. H. Fifield, for the appellant.

Wilson & Wilson, for the respondent.

THORNTON, J.—The court below, in granting the nonsuit in this case, misconceived the meaning of the contract for passage between the plaintiff and defendant. In our view, it was only required of the plaintiff that he present himself at the cars of the Union Pacific Railroad Company, or of the defendant, and take passage at any time within nine days from the 12th day of March, 1874. The plaintiff took passage on the 21st of the same month, and was illegally ejected from the cars of defendant by its servant, on the morning of the twenty-fifth following.

The admission of defendant showed clearly that the contract for carrying the plaintiff from Omaha to San Francisco, though made by the Union Pacific Railroad Company, was made by authority of defendant.

We have no doubt that the action was properly brought against the defendant.

We see nothing in the evidence to uphold the ruling of the court below, non-suiting the plaintiff, and the judgment and order denying a new trial are, therefore, reversed and the cause remanded, that a new trial may be had in accordance with the views herein expressed.

Sharpstein, J., and Myrick, J., concurred.

Tickets with Time Limited.—For a full collection of the authorities upon this subject, see *Pennington v. Phila. W. & B. R. Co.*, and note, *infra*.

Analogous Case.—The case of *Auerbach v. New York Central R. R. Co.*, 6 Am. & Eng. R. R. Cas. 884, is to precisely the same effect as the principal case reported above.

PENNINGTON

v.

PHILADELPHIA, WILMINGTON & BALTIMORE R. R. Co.

(*Advance Case, Maryland, July, 1884.*)

The plaintiff bought an excursion ticket at a reduced rate, good for a limited time only. He attempted to return on the ticket after the time had expired, and was expelled from the train. *Held*, that the rights of the plaintiff were limited by the ticket, and that, after being expelled, he had no right to re-admittance except upon paying the fare from the starting point.

The appellant purchased from a ticket agent of the appellee a ticket, of which the following is a copy: "Excursion ticket—Phila., Wilm. & Balt. R. R. (One continuous passage), Perryman's to Baltimore. In consideration of the reduced rate at which the ticket is sold, it is agreed that it shall be used within three days, including the day of sale, for a continuous trip only, and by such trains as stop regularly at the station, and by its acceptance the purchaser becomes a party to and binds himself to a compliance with these conditions. Geo. A. Dadmund, General Ticket Agent." On the back of the above ticket is the following stamp, to wit: "Phila., Wilm. & Balto. R. R. December 13, 1882. Baltimore." He proceeded in appellee's cars to Perryman's, on December, 13, 1881, and while attempting to return on December 16th, the conductor refused to receive the ticket for his passage, and required him to leave the cars. The controversy depends upon the rights acquired by the purchase of the ticket. The plaintiff, at the trial below, offered to prove that before he purchased the ticket he was informed by the agent, upon inquiry from him, that it was good until used.

BRYAN, J.—We think that the plaintiff's rights in this regard are limited by the ticket. There is no evidence in the record that the ticket agent was authorized to make any contracts for the railroad company, or that he had any duties beyond the sale and delivery of the tickets. The ticket purchased by the appellant clearly informed him that he would have no right to use it after the fifteenth, and the agent had no authority to vary its terms.

A passenger has a right to be conveyed in the cars of railroad

companies without making any special contract for transportation. Upon payment of the usual fare, the company is bound to convey him, and is under all the obligations imposed by law on common carriers, so far as they relate to the transportation of him as a passenger. It is competent to vary these obligations by a special agreement on valuable consideration between the passenger and the company. But if the passenger choose to do so, he may stand on his legal rights, and elect to be carried to his destination without making any special contract. The mere purchase of a ticket does not constitute a contract. Before the ordinary liability of the railroad company can be varied, there must be a consent of the passenger founded on valuable consideration. The ticket, ordinarily, is only a token showing that the passenger has paid his fare. But where the ticket is sold at less than the usual rates, on the condition that it shall not be used after a limited time, if the passenger accepts and uses the ticket, he makes a contract with the company according to the terms stated, and the reduction in the fare is the consideration for his contract. It is true he pays his fare before he receives the ticket; but if he has been misled or misinformed by the seller of the ticket as to its terms, he has a right to return the ticket and receive back his money. The railroad company agrees to carry him at the reduced rate upon the conditions stated on the face of his ticket; if he agrees to those terms, the contract is consummated; but he cannot take advantage of the reduction of the rate and reject the terms on which alone the reduction was made. In this case, the plaintiff made the journey to Perryman's under the terms mentioned in the ticket. There was evidence that he did not read the ticket. He used it, and thereby availed himself of the advantage conferred by the diminished rates. He had an ample opportunity to read it if he had chosen to do so. He could not on any principle hold the railroad company to any terms except those stated. If there was a contract, these terms were embraced in it; if there was no contract, he had no right to the reduction in the fare. After availing himself of this reduction, it was too late for him to allege that he did not know on what terms the reduction was made, when he had an ample opportunity of learning them from the ticket in his possession. The plaintiff was required to leave the cars at Black River station, on his journey back to Baltimore from Perryman's. After he had left the cars, and while on the platform, he offered to pay the conductor his fare from that station to Baltimore, but the conductor refused to give him admission to the cars. The plaintiff had already accomplished a portion of the return journey to Baltimore without paying his fare. He clearly was not entitled to be conveyed from Perryman's to Baltimore without paying fare for the whole distance. If he had been carried from Black River station to Baltimore on payment of the fare only from that place,

he would have escaped payment of a portion of the fare, and so in fact he would have accomplished the return trip at a reduced rate. The company was under no obligation to carry him for less than the full rate for the whole distance, and so he was properly excluded from the cars.

Judgment affirmed.

Tickets Available for Limited Time.—When upon its face a ticket is issued available for a limited time only, a passenger cannot claim to ride by virtue of it after the expiration of the time limited. *Wentz v. Erie R. Co.*, 8 Hun, 241; *Barker v. Coffin*, 81 Barb. 556; *Nelson v. Long*, 18 Cand. R. Co., 7 Hun, 140; *Elmore v. Sands*, 54 N. Y. 512; *Hill v. Syracuse, B. & N. Y. R. Co.*, 63 N. Y. 101; *Johnson v. Concord R. Corp.*, 46 N. H. 213; *Keely v. Boston & Me. R. R. Co.*, 67 Me. 168; *Boston & L. R. Co. v. Proctor*, 1 Allen, 267; *Briggs v. Grand Trunk R. Co.*, 24 Upp. Can., Q. B. 510; *Pier v. Finch*, 24 Barb. 244; *McClure v. Phila., W. & B. R. Co.*, 34 Ind. 532; *Auerbach v. New York Central R. Co.*, 3 Am. & Eng. R. R. Cas. 334.

Commutation, Mileage, Return and Excursion Tickets.—This principle applies to commutation tickets. *Powell v. Pittsburgh, C. & St. L. R. Co.*, 25 Ohio St. 70.

Mileage Tickets. *Lillies v. St. Louis, K. C. & N. R. Co.*, 64 Mo. 454.

Return Tickets. *Farwell v. Grand Trunk R. Co.*, 15 Upp. Can., C. P. 497.

And excursion tickets. *State v. Campbell*, 37 N. J. L. 309; *Howard v. Chicago, St. L. & N. O. R. Co. infra*; *McRae v. Wilmington & Weldon R. R. Co. infra*.

Fact that Passenger has Before Ridden on such Tickets Does not Establish Usage to that Effect.—The fact that the passenger has on other occasions been permitted to ride on an expired ticket, or even upon the particular ticket in question, does not establish a custom of the company to that effect, and so entitle the passenger to transportation. *Hill v. Syracuse, B. & N. Y. R. R. Co.*, 63 N. Y. 101; *Stone v. Chicago & N. W. R. Co.*, 47 Iowa, 82; *Sherman v. Chicago & N. W. R. Co.*, 40 Iowa, 45.

Checking of Baggage.—Nor does the checking of baggage upon such ticket. *Wentz v. Erie R. Co.*, 8 Hun, (N. Y.) 241.

Acts of Conductors Without Knowledge or Assent of Officers.—Nor does the fact that the conductors of the company have in other instances accepted for passage tickets the limitation of which has expired, constitute evidence of such usage, when such conduct is not shown to have been known by the officers of the company. *Johnson v. Concord R. Corp.*, 46 N. H. 213; *Wakefield v. South Boston R. R. Co.*, 117 Mass. 544; *Boice v. Hudson River R. Co.*, 61 Barb. 611; *Dietrich v. Pennsylvania R. Co.*, 71 Pa. St. 482.

Verbal Declarations of Ticket Agents.—A mere verbal declaration by an agent of the company that a party is entitled to ride upon a ticket the limitation of which has expired, does not entitle him to passage. *Boice v. Hudson River R. Co.*, 61 Barb. 611; *McClure v. Phila., W. & B. R. Co.*, 34 Md. 532; *Hall v. Memphis, etc., R. R. Co.*, 9 Am. & Eng. R. R. Cas. 348.

But see *Nelson v. Long Island R. Co.*, 7 Hun, (N. Y.) 140.

Party Being Expelled for Non-Payment of Fare Cannot by Tendering Fare Acquire Right to Passage.—A passenger who is not furnished with a proper ticket and who refuses to pay his fare may be expelled. The conductor may stop the train at any point for that purpose, and if, during or after expulsion, the passenger tenders the fare from that point to his destination, he is not entitled to passage. *Stone v. Chicago & N. W. R. Co.*, 47 Iowa, 82; *Davis v. Kansas City, St. J. & C. B. R. Co.*, 53 Mo. 317.

Nor can he, it seems, when the train has been stopped to expel him, acquire a right to passage by tendering the whole fare from the point at where he originally started. His rights are fixed as soon as the train is stopped. Any other doctrine would put it in the power of a passenger to cause the

train to be stopped to satisfy his whim or caprice. *People v. Gillson*, 8 Park Cr. Cas. 234; *State v. Campbell*, 32 N. J. L. 309; *O'Brien v. Boston & Worcester R. Corp.* 15 Gray. 20; *Hibbard v. New York & Erie R. Co.*, 15 N. Y. 545; *Fulton v. Grand Trunk R. Co.*, 17 Upp. Can. Q. B. 428; *Hoffbauer v. D. & N. W. R. Co.*, 52 Iowa, 342; *Nelson v. Long Island R. Co.*, 7 Hun, (N. Y.) 140; *Skillman v. Cincinnati, S. & C. R. R. Co.*, 13 Am. & Eng. R. R. Cas. 31; *Louisville, N. & Gt. S. R. R. Co. v. Harris*, 9 Lea. (Tenn.) 180; s. c. 16 Am. & Eng. R. R. Cas. 374.

But this somewhat harsh rule is in recent cases confined strictly to instances where it is evidently proper to enforce it. Where, therefore, the train is stopped at a regular station in accordance with the schedule, and the party is there ejected, he has a clear right to insist upon being carried to his destination if he tenders full fare. *O'Brien v. New York Central & H. R. R. Co.*, 80 N. Y. 236; s. c. 1 Am. & Eng. R. R. Cas. 259.

And where the refusal to pay is not factious or captious on the part of the passenger, but merely arising out of mistake, it is not too late to tender the full fare after the conductor has actually begun the expulsion. *Guy v. New York, O. & W. R. Co.*, 80 Hun, (N. Y.) 899; *Garrett v. Louisville & N. R. R. Co.*, 13 Am. & Eng. R. R. Cas. 416; *Louisville, N. & Gt. S. R. Co. v. Harris*, 9 Lea. (Tenn.) 180; s. c. 16 Am. & Eng. R. R. Cas. 374; *Hayes v. New York Central R. Co. supra*; and see *Curl v. Chicago, R. I. & P. R. Co.*, 11 Am. & Eng. R. R. Cas. 85; s. c. 16 Am. & Eng. R. R. Cas. 379.

HOWARD

v.

CHICAGO, ST. LOUIS AND NEW ORLEANS RAILROAD COMPANY.

(61 *Mississippi Reports*, 194.)

A railroad excursion ticket which contains a special contract is conclusive, and advertisements of the tour are inadmissible in evidence to vary its terms.

If such ticket provides that it is exchangeable for another good for the day and train designated in the latter, the holder of the exchange ticket cannot travel on a later train and day.

APPEAL from the Circuit Court of Yalobusha county.

Posters and handbills, advertising "a strictly first-class excursion," over the appellee's railroad to New Orleans on October 25, 1881, stated that passengers could "remain five days in the city," and added: "Tickets good to return any day and on any regular train for five days," and also these statements: "Tickets on sale by our agents at all prominent stations," and "Fare for the round trip from Water Valley, \$6.00." These notices concluded: "For further information, apply to our agents, or address A. B. Pitts, E. W. Burrage, Managers, Gallman, Miss." In the railroad station house at Water Valley, one of the large advertisements was posted. The appellant, relying upon the placard, bought from a storekeeper at Water Valley, Mississippi, a ticket like the following:—

"EXCURSION TICKET

From Water Valley to New Orleans and Return.

TUESDAY, OCTOBER 25, 1881.

Good going on this day and train only. \$6.00.

 [OVER] A. B. Pitts, }
E. W. Burrage, } **Managers."**

On the other side was printed: "This ticket is not good on return trains, but when properly stamped by conductor of excursion train, can be exchanged at ticket office at New Orleans for a ticket *good for the day and on the train designated on the face of such exchange ticket*. This ticket will not be exchanged unless it bears conductor's stamp, and must be presented for exchange on day party wishes to leave."

On October 25, 1881, the appellant got on the excursion train at her home, Water Valley, and noticed that the handbills were distributed about the cars. Wishing to visit McComb City, she asked the conductor, who advised her that she could stop and send forward the excursion ticket to New Orleans, and have it exchanged according to its stipulations. She accordingly got off the train at this station, confiding her ticket to another passenger, who kept on to New Orleans. This passenger made the exchange, and, as he returned, left at McComb City for her the return ticket as follows:—

**"C. St. L. and N. O. R. R.
EXCHANGE EXCURSION TICKET.**

New Orleans to Water Valley.

**Good on train and date stamped on back hereof. No
stop-over allowed on this ticket."**

On one side of this ticket was stamped: "Train 3," on the other side was a round stamp with the following:—

**"C. St. L. & N. O. R. R.
Depot Office, New Orleans.
Oct. 27, 1881."**

Supposing that her ticket was right, on October 29, 1881, the appellant got on a train at McComb City, bound north from New Orleans, and the conductor, after examining her ticket, said it was not good, and she must pay her fare or get off. She had only fifteen cents, and declined to do either. At the next station he put her off the train. It was night and a storm was raging. She stayed in the railroad station house until two o'clock next morning, when a southbound train carried her for the fifteen cents back to McComb City, and left her there in the rain and mud

nearly 200 miles from home. She was attacked with rheumatism, and confined to her bed for three weeks.

The appellant sued the appellee for \$10,000 damages, averring that she supposed and had a right to suppose that the return ticket, which she exhibited with her declaration, gave her the privilege of returning at any time within the five days. The railroad company pleaded a general denial. After the plaintiff had introduced her return ticket and testimony as to the conductor's conduct, she proposed to put in evidence the handbills and posters. The defendant objected, upon the ground that the suit was on a ticket which constituted the contract, and Pitts and Burrage were not connected with the railroad company. This was overruled, and the advertisements were read to the jury. The defendant then introduced the excursion ticket, and under the plaintiff's objection read the indorsements on both tickets. With some testimony that another tourist completed the journey on a similar ticket by conforming to the rules, and that the plaintiff was cared for by the night watchman when put off the train, the railroad company closed its evidence.

At this point the defendant moved to exclude from the jury the large advertisement and the circular upon the same grounds on which it objected to their introduction, and the court sustained the motion, for the reasons that, if they had any effect, it was to contradict the contract sued on, and they amounted only to a proposition, while the ticket subsequently purchased from the defendant was the contract between the plaintiff and defendant. The plaintiff excepted, and asked leave to amend her declaration. This was granted, and she amended it so as to cover all the facts, and again offered the excluded advertisements; but the court refused to admit them. Verdict being given for the defendant, the plaintiff moved to set this aside because the court erred in excluding the handbill and placards, and in permitting the indorsements on the tickets to be read. The motion was overruled, and she appealed from the judgment.

A. H. Whitfield and M. E. Sullivan, for the appellant.

W. P. & J. B. Harris, for the appellee.

CAMPBELL, C. J.—When a ticket does not purport to be a complete agreement between the carrier and the passenger, supplementary evidence is admissible to show that there was a further contract than is indicated by the ticket, but when it sets out the terms of a special contract, it is to be looked to as the evidence of the contract, and is conclusive as to its terms. The ticket purchased by the appellant contained the terms of the contract for carriage, and was properly regarded by the circuit court as the sole evidence of her rights. It was, therefore, not erroneous to exclude the testimony offered by her. But with this testimony before the

jury, it would have been the duty of the court to instruct the jury to find for the defendant. There is nothing in the testimony excluded inconsistent with the ticket. The appellant should not have been misled as to the terms on which a return ticket was procurable in New Orleans, and it was her misfortune and not the fault of the appellee that she encountered any difficulty on her return. She was chargeable with a knowledge of what her ticket set forth in unmistakable terms. It plainly stated that it was exchangeable "at ticket office at New Orleans for a ticket *good for the day and on the train designated on the face of such exchange ticket.*" The appellant sent her ticket to New Orleans to be exchanged for a return ticket, and receiving the return ticket to which she was entitled, failed to use it on the day and train for which it was available, and sought to travel home on it two days after the day for which it was issued and to which it was limited. No wrong was done by the refusal to carry her on that ticket. She got all that she bargained for, and could claim no more because of her misunderstanding of the terms of the contract.

Tickets for Limited Time.—Tickets good for a certain day and train are not available on another day and train. See for a full collection of authorities on this point, *Pennington v. Philadelphia W. & B. R. Co.*, and note, *supra*.

McRAE

v.

WILMINGTON & WELDON RAILROAD COMPANY.

(88 *North Carolina Reports*, 526.)

Railroad companies can make reasonable regulations for the management of trains.

The purchaser of a ticket is bound to inform himself of such regulations, and must conform to the custom of the road in transporting passengers.

A regulation that persons purchasing tickets for an excursion shall travel upon the train provided for that special purpose, and not upon a regular train, is a reasonable regulation.

The managers of an excursion from Wilmington to Washington contracted with the defendant company for a train of cars at a certain sum, and after advertising the time, etc., sold card tickets at \$6.50 for the round trip; after the departure of the train and when it had proceeded a few miles, the defendant's conductor passed through the cars and took up the card-tickets, and in lieu thereof gave coupon-tickets in order that the connecting roads might hold vouchers to obtain their *pro rata* share of the excursion money, in settling with the defendant; *Held*, that this did not change the original contract with the managers.

The terms of the contract, contained in the coupon-ticket, did not confer the right upon the plaintiff excursionist to return on a regular train, even at an earlier day than that advertised for the excursion, without paying the regular fare.

In a suit by the plaintiff against the company to recover damages for an assault by the conductor who attempted to put him off a regular train unless the fare was paid; the plaintiff testifying among other things that he supposed he had the right to return on any train after the delivery of the coupon-ticket, but was compelled to pay additional fare for such privilege, it was held error in the court to charge the jury that they might consider the understanding and agreement of the parties in determining the character of such ticket—there being no evidence of any agreement between the plaintiff and defendant.

CIVIL action tried at Fall term, 1882, of New Hanover Superior Court.

The plaintiff brought this action to recover damages for an assault and battery, alleged to have been committed on him by E. D. Browning, a conductor on one of the defendant's trains, and the jury returned a verdict assessing the plaintiff's damages at \$1,000.

Some time before the 13th of June, 1881, one W. H. Howe and Anthony Maultsby contracted with the defendant company, at a fixed sum, to furnish them a train of cars for an excursion from Wilmington to Washington city and return. The excursion was advertised by them on printed cards as follows:

“GRAND EXCURSION—WILMINGTON TO WASHINGTON CITY AND RETURN—MONDAY, JUNE 13TH, 1881.”

“There will be an excursion from Wilmington to Washington city and return, leaving Front street depot at three o'clock P. M., Monday, June 13th, arriving in Washington Tuesday morning at ten o'clock. Returning, leave Washington Thursday morning at five o'clock and arrive in Wilmington Thursday night at twelve o'clock. Rates of fare, round trip, from Wilmington to Washington and return, \$6.50.” (Also giving rates from intermediate points, and other details not material to the case.)

Tickets were issued for the trip in the following form: “Grand excursion from Wilmington to Washington and return—Monday, June 13th, 1881.” (Signed by Howe & Maultsby, Managers, and endorsed by Howe.)

One of these tickets was purchased by the plaintiff at the published rate of \$6.50, less than one-fourth of the regular fare for round trip from Wilmington to Washington, and he took his seat in the cars on the said Monday. When the train had passed Smith's creek, about two miles from Wilmington, the conductor went through the cars, taking up the tickets issued by the said managers, and gave in lieu thereof tickets in the following form:

[326] First Class—Washington and return—Form Special—Wilmington & Weldon Railroad Company—Special limited excursion ticket—Good for one first-class passage to Washington and return, subject to the following contract: “Having purchased

this ticket at a reduced rate, I do, in consideration thereof, agree to be bound by and comply with the following conditions in respect thereto: The trip from point of sale hereof to point of destination shall be made within one day from the date of issue stamped hereon. The return from point of departure to point of destination shall be made within one day from date of such departure. This ticket and the check attached are not assignable, and will be good only in the hands and for the transportation of the original purchaser. This ticket and all checks attached shall be used in conformity to the above conditions between June 13th and 17th, 1881, and in any event shall be void on and after June 18th, 1881. This ticket and check attached shall be void unless the foregoing conditions are complied with. This ticket is void unless stamped and dated. In selling this ticket for passage over other roads, this company acts only as agent, and assumes no responsibility beyond its own line. This company assumes no risk on baggage except for wearing apparel, and limits its responsibility to \$100 in value; all baggage exceeding that value will be at the risk of the owner, unless taken by special contract. The checks belonging to this ticket will be void if detached."

The tickets were stamped and dated, and had coupons or checks attached.

There were five different connecting roads between Wilmington and Washington, and each road had its own conductor on the excursion train. The defendant's conductor went no further than Weldon. The reason why the coupon-tickets were issued in lieu of the cards issued by Howe and Maulsby, was merely that the roads beyond Weldon might have vouchers or checks to show the amount of the excursion money due to each, in settling with the defendant. There was at that time a regulation of the defendant that persons purchasing tickets for an excursion should return by that train, and no other. These regulations were in manuscript, and were issued to the assistants of the general passenger agent, and there was no other publication of them, except that the hand-bills for every excursion contain the time of departure and arrival of the train.

The foregoing facts were elicited from the examination of the witnesses on either side, and are uncontradicted.

In addition thereto, the plaintiff testified that in returning from Washington he was permitted to travel on all the roads from Washington to Weldon on the coupons of the ticket, without paying additional fare. At Petersburg, he heard some one, whom he supposed to be an agent, announce that those who had excursion tickets would have to pay their fare to Wilmington, but the conductor said he would take the coupons, and he did take them. This was objected to, but allowed, and defendant excepted. When he got to Weldon, he took his seat in the defendant's regular pas-

senger train for Wilmington. Browning, the conductor, stated that those who had excursion tickets must pay their fare, or get out. He showed the conductor his ticket at Weldon. When the train reached Halifax, the conductor showed him a telegram from one Sanders, and peremptorily ordered him to get off the train or pay his fare to Wilmington. He told him he would do neither, and the conductor then said he would put him off. The witness said, "Be sure you are right, for there will be trouble." The conductor then took him by the arm with both hands; he braced himself against the car; conductor jerked him from the window and called in two negroes; he then paid his fare. Browning seemed to be laughing and chuckling with the passengers, which made the witness feel very badly; he paid the fare because the conductor would have put him off if he had not paid; conductor looked pale, but did not curse or swear, and has remained ever since in the employment of the company.

The plaintiff also stated that he thought he had seen the handbills before leaving Wilmington, and knew that fare from Wilmington to Washington and return, on the regular train, was much more than \$6.50, and when he left he did not expect he would be able to return on any other than the excursion train; but when he received the excursion ticket, he thought he could return at any time. He expected to pay his fare on all the roads between Washington and Weldon, but did not expect to pay between Weldon and Wilmington, because the defendant had issued the ticket. None of the excursionists but himself returned to Wilmington by the train he was on. Some went as far as Halifax, but got off there. He said he did not hear it announced on the cars that the excursionists would have to return on the excursion train.

Howe, one of the managers, testified, on behalf of defendant, that he went through the cars with the conductor as he issued the coupon-tickets, and took up the cards and told the passengers they would have to return on that train, and no other. He made the announcement in each car, but did not know that the plaintiff heard it.

Maultsby, the partner of Howe, testified that he, too, went through the cars with the conductor, and, when asked if the tickets were good to return by any other train, he replied that they were issued for that train only, and he could not tell about any other train, and the plaintiff was near by when the announcement was made.

Edens, a passenger on the train, testified that when Maultsby or Howe came through the cars and issued the tickets, he said they would have to return on that train, and it was spoken loud enough to be heard by everybody in the car, and plaintiff was sitting about three feet from him.

Browning, the conductor, testified that on the day the excursion

train arrived at Waldon from Washington, he went on his train and announced that all who had excursion tickets would have to pay their fare, or get off the train, and that plaintiff said, "I had better carry him." He told him he had no authority to carry him on that ticket, but he would telegraph to the authorities of the road for further instructions. When the train reached Halifax, he received a telegram in reply and showed it to plaintiff, and told him he would have to pay his fare. He said he would not do it, and the witness told him he would have to put him off the train, and the plaintiff said "I would have to put him off by force." He had a stick in his hand, and the witness took him by the wrist and told him he would have to get off or pay, and the plaintiff jerked his hand back, and said he would pay the fare. Witness was not angry, and testifies this was all he did; he did say to the plaintiff he had train-hands to help him put him off, but did not call them. Several negroes came into the car. He stated that the company's order to him was to make every person who had not a proper ticket pay fare or get off the train. He had been conductor on defendant's road for twenty-five years.

Judgment for plaintiff; appeal by defendant. The instructions to the jury are sufficiently stated in the opinion.

McRae & Strange, for plaintiff.

George Davis, for defendant.

ASHE, J.—Howe and Maulsby contracted with the defendant for the use of its train for an excursion from Wilmington to Washington and return. They were the managers of the excursion. The excursion was advertised in handbills, over their signatures, to leave Wilmington on the 13th of June, and return on the 17th, and tickets, called cards, were issued by them at the reduced price of \$6.50, being less than one-fourth of the price of the regular fare from Wilmington to Washington and back. The plaintiff purchased one of these tickets. They were sold to him by Howe and Maulsby, the managers of the excursion. The contract was with them, and not with the defendant, for a seat in the excursion train for the round trip from Wilmington to Washington.

The only question for our consideration is: did the plaintiff have a right to a seat upon the regular train of the defendant?

Railroads have the power to make reasonable regulations for the management of their trains (1 Red. on Railways, 98; Thompson's Carriers, 306), and with the same qualification of reasonableness, it is also well settled, that one who buys a ticket is bound to inform himself of the rules and regulations of the company governing the transit and conduct of its trains. *Deitrich v. R. R. Co.*, 71 Pa. St. 432. It follows that where a passenger purchases a ticket, he only acquires the right to be carried according to the custom of the road. When he purchases such a ticket,

he should inform himself as to the usual mode of travel on the road; and so far as the customary mode of carrying passengers is reasonable, he should conform to it. The requisite information can always be obtained from the agent from whom the ticket is procured; and it is but reasonable to require passengers to obtain the information and to act upon it. *R. R. Co. v. Randolph*, 53 Ill. 515.

The evidence shows that at the time of this excursion there was a regulation of the defendant company, that persons purchasing tickets for an excursion train should return by that train, and no other; and the regulation is reasonable. For if several hundred passengers on an excursion train could leave that train at any point and take seats in a regular train, it would produce great discomfort to the proper passengers, and intolerable confusion and inconvenience.

The regulation was proclaimed throughout the cars, and in three feet of the plaintiff; and although he says he did not hear it, it was his business to inquire. But he did have notice, for he admits in his testimony that he had seen the handbills advertising the excursion before he purchased his ticket from the managers. It was subject to this regulation that he made the contract with the managers; and when the ticket, or card, was paid for and received by the plaintiff, the contract between them was consummated, and the rights of the parties were then determined. *Rawson v. R. R. Co.*, 48 N. Y. 212. Most unquestionably, this contract did not give the plaintiff the right to a seat on the regular train.

The plaintiff insists the contract was changed by the defendant after leaving Wilmington, when its agent, the conductor, took up the card and substituted in its place the coupon-ticket. He admits when he received the ticket from Howe and Maultsby that he had no idea but that he would have to return on the excursion train, but that after receiving the coupon-ticket from the defendant's conductor, he concluded he would have the right to travel upon a regular train of the defendant, but not upon those of the other roads. In other words, that he and the several hundred excursionists, who had purchased tickets at the reduced price of \$6.50, were entitled to travel upon any of the regular trains of the defendant between Wilmington and Weldon.

The conclusion of the plaintiff is so preposterous in a business point of view, that it is not surprising that he alone, of all the passengers on the excursion train, should have been the only one who asserted such a right under that construction of the ticket. But the jury, upon the issues submitted under the instructions of the court, seem to have come to a like conclusion.

The question, then, is: was there error in the instructions given to the jury?

The defendant requested the court to submit this issue to the jury: "Was the coupon-ticket issued without any intention of changing the contract between the parties?" The purpose, it seems to us, for which the coupon-tickets were issued by the defendant was a material inquiry; and the intent with which they were issued should have been submitted to the jury as a question of fact to be determined by them. But the court refused to submit the issue, and in lieu thereof submitted the following: "Did the plaintiff have a ticket which authorized him to occupy a seat in a regular train, as alleged in the complaint?" and upon this his honor charged the jury, that if the plaintiff accepted the coupon-ticket from the agent of the defendant company with the *understanding and agreement* that it was only to be used upon the excursion train, and he returned upon another train than that provided for the excursion party, the company would have had the right to demand pay for carrying him upon the other train, "and you should say in response to that issue, no;" but if the plaintiff did not accept the ticket upon this condition, that he was to return on the excursion train, and no other, "you should respond to the issue, yes."

We are of opinion there is error in this instruction. The error consists in leaving it to the jury to consider the understanding and agreement of the parties in determining the character and effect of the coupon-ticket. The understanding of the parties amounted to nothing unless it was mutual and concurrent, and there was no evidence of such a mutual understanding. The defendant understood the ticket as only carrying out the original contract, and issued in lieu of the card only for the purpose, as testified by one of its agents, that the roads beyond Weldon might have vouchers or checks to show the amount of the excursion money due to each, in settling with the defendant. The plaintiff says, on the other hand, that he understood the ticket as giving him the right to ride upon any train of defendant.

The construction of a contract does not depend upon what either party *thought*, but upon what both *agreed*. *Brunhild v. Freeman*, 77 N. C. 128.

The question then arises, was there an agreement between the parties that the coupon-tickets were to be used on the excursion train only, or upon any other train of the defendant? There was no actual agreement, and none can be inferred from the ticket itself. There is not a word in it about the right or authority to use it on a regular train. So far from that, it bears internal evidence that it was used on the excursion train, and no other. It is headed, "First-class, Washington and return, form special, Wilmington & Weldon railroad company, special limited excursion ticket."

We are unable to conceive how any one could suppose that such

a ticket, delivered as it was, on a special excursion train to a passenger, who had purchased a ticket at a greatly reduced price, with full knowledge that it was to be used on that train only, could give him the right to travel on any other train of the defendant. It could have reference only to the moving special train, upon any reasonable interpretation.

But the plaintiff contends that the contract contained in the ticket extended the plaintiff's right to return on the 18th day of June, and as the excursion train, by the contract between the defendant and managers, must return on the 17th, it follows that if he should see proper to defer his return until the 18th, he would have the right to travel on a regular train, and that if it gave him the authority to do so on that day, it must equally confer the right to do so on the 16th of June. But we cannot concur in that interpretation. The language of the ticket is: "This ticket and all checks attached shall be used in conformity to the above conditions, between June the 13th and June the 17th, 1881, and in any event shall be void *on* and after June the 18th, 1881." The time for the return of the excursion train by the original contract, as well as by the terms of the coupon-ticket, is limited to the 17th of June; and what is added, "in any event shall be void *on* and after June the 18th, 1881," was used to make the limitation to the 17th the more definite—that is, that it should be void on the 18th; as a matter of course, it would be void after that date.

The evidence in the case is, that the coupon-ticket was given solely for the purpose of carrying out the original contract between the defendant and the managers, and was no evidence of a change in that contract. His honor should, therefore, have instructed the jury that there was no evidence of an understanding and agreement between the plaintiff and the defendant, that the plaintiff might ride on any train of the defendant, except that provided specially for the excursion; and that even if there was such an agreement, it was without consideration. His failure to so instruct the jury is error.

Under this view of the case, it is unnecessary to consider the question of damages, or the other exceptions taken. There must be a new trial. Let this be certified, etc.

Error.

Venire ae novo.

Tickets with Limited Time.—Whenever a passenger buys a ticket good on a certain day or train, he cannot make use of said ticket on another day or train. See *Pennington v. Philadelphia, W. & B. R. Co., supra*.

CITY & SUBURBAN RAILWAY OF SAVANNAH

v.

BRAUSS.

(70 *Georgia Reports*, 368.)

Plaintiff and his wife entered a street car, and presented to the conductor tickets entitling them to ride to their point of destination. Plaintiff informed the conductor where he wished to go. Between the beginning and the end of the journey it was necessary for plaintiff to be transferred from one car to another, and he was transferred personally by the conductor of the first car, but was given no transfer ticket, nor did he know that one was necessary. Subsequently the conductor of the second car called for a transfer ticket or another payment of fare, and in default thereof ejected plaintiff and his wife, requiring them to get off the car in the mud a short distance from the street crossing, and in the presence of a number of people:

Held, that the case was one authorizing exemplary damages in a suit against the company.

Brauss brought suit against the City & Suburban Railway of Savannah. His declaration contained two counts, the first of which alleged, in brief, as follows:

The defendant was a common carrier for hire of passengers by street cars, in the city of Savannah. Plaintiff entered one of defendant's cars on Anderson street and became a passenger, and the defendant received the usual and customary fare, and became bound to convey plaintiff from Anderson street along Abercorn street to Liberty street, and then to give to plaintiff a transfer ticket, by virtue of which another of defendant's cars would carry him from Liberty street to his place of residence. Defendant's agent, however, neglected and refused to give plaintiff a transfer ticket, and, upon receiving his fare, informed him that such fare would entitle him to ride to his destination; and thereupon, at Liberty street, the conductor of the first car stopped the Liberty street car and personally transferred plaintiff thereto, placing him under the charge, care and protection of the conductor of the second car. But the latter subsequently demanded payment of fare or the production of a transfer ticket from plaintiff, and upon plaintiff's failure to comply with the demand, ejected him in the middle of the street, requiring him to get off in the mud; and the defendant broke its contract of carriage with him. The car was crowded with passengers, and plaintiff was mortified, disgraced and damaged by such expulsion. Plaintiff complained to the company of his treatment, and was willing to come to a settlement of his damages, but the latter refused to pay him anything, and thereby became liable to him for counsel fees for stubborn and litigious conduct.

The second count alleged substantially the same facts, and in addition alleged that no transfer ticket was necessary at the junction of Abercorn and Liberty streets.

The evidence for the plaintiff was, in brief, as follows: On Sunday afternoon, April 30, 1882, he and his wife boarded defendant's car at the junction of Anderson and Abercorn streets. He had purchased some street car tickets two days before, and had three of them left. He inquired of the conductor whether these tickets would be sufficient to carry him to his destination. The latter said that they would. He thereupon gave a ticket for himself and one for his wife, and informed the conductor that he desired to be transferred at Liberty street to the car which would carry him to his home. On reaching Liberty street, the conductor of the car in which plaintiff was hailed the conductor of the Liberty street car, and informed him that he had a transfer. The latter stopped, and plaintiff and his wife entered the Liberty street car. After it had started, the conductor called upon plaintiff for his fare. Plaintiff claimed that he had been transferred, but the conductor insisted that he must have either a ticket or a fare. Plaintiff had no money in his pocket at the time, and declined to pay. The conductor stopped the car in the middle of the block, and plaintiff and his wife were compelled to get out in the mud and walk home. The conductor's manner was "very short." There were about thirty people in the car, and he was much ashamed and wounded in his feelings when required to leave. On Monday morning following, he met the president of the company, and complained to him, telling him that he wanted satisfaction. The president responded that he would see the superintendent. Plaintiff said he wanted satisfaction. The president said he could give him none. If the necessary apologies and reprimands had been made, there would have been no suit. Plaintiff did not know of the requirement of a transfer ticket at the point where the transfer was made. At another junction on defendant's line, he had been transferred without a ticket, and transfers were so made at that place. On the succeeding day, a witness, to test the point, rode over the same track, and was transferred without a ticket.

The evidence for the defendant was, in brief, as follows: The Abercorn street car was what is known as a "bob-tailed" car, in which passengers deposit their fares in the box, and the driver or conductor is not allowed to receive them. The driver on this car sometimes acted as conductor on other cars, and would then receive fare. There was a junction on defendant's line where passengers were personally transferred from one car to another, but the Abercorn and Liberty street cars did not ordinarily connect with each other, and transfer tickets were required, and notice to this effect was published. The conductors were furnished with trans-

fer tickets, and required to furnish them to passengers upon application therefor. No direct application was made for transfer tickets by the plaintiff, nor did the conductor of the Abercorn street car remember the conversation detailed by plaintiff. The Liberty street car happened to be behind its usual time, and the two cars met. The conductor of the Liberty street car heard some one hail him, and, on stopping, plaintiff and his wife boarded the car. It was his duty to require transfer tickets or money from passengers for the payment of fares. Plaintiff declined to furnish either, saying that he had been transferred from Abercorn street. The conductor could not, under the rules of the company, accept such a statement from a passenger in lieu of fare, and he was compelled to require plaintiff and his wife to leave the car. Plaintiff said he was near home and it made no difference. There was no ill-will toward plaintiff on the part of the conductor. He did not consider it his duty to put them off at a crossing, but stopped the car where he did, because he was near the curve of a switch, and the rule was not to stop on a curve. The president denied any discourtesy to plaintiff, but said that he could not reprimand drivers without investigation, as frequent attempts were made to evade the payment of fare, and upon investigation thereof, he became satisfied that the conductors had acted properly.

The jury found the following verdict:

"We, the jury, find for the plaintiff the amount of his attorney's fees and costs of court, as established by the practice of this court, and further find for plaintiff in the sum of fifty dollars (\$50) as damages."

Defendant moved for a new trial on the following grounds:

(1) Because the presiding judge allowed the said plaintiff, against the objection of defendant, to testify as to his feelings when required to leave the Liberty street car of defendant, upon the failure and refusal of plaintiff to produce a ticket or pay his fare, it appearing from the evidence that any wound to plaintiff's feelings was caused by his own conduct in so refusing.

(2) Because the judge, at the conclusion of plaintiff's evidence, and of the evidence produced on his behalf, refused, on motion of defendant, to nonsuit said plaintiff and dismiss said case, it appearing from said evidence and the petition filed, that said complaint was for an alleged wrong done by defendant's violation of its contract; that said case as presented was a case arising on contract; that no actual pecuniary loss or damage was proved, and that the only damage claimed was exemplary damage for alleged injury to plaintiff's feelings.

(3) Because the judge erroneously charged the jury as follows: "If the conductor of defendant's car said or did anything which misled the plaintiff into going upon the other car of defendant without a proper ticket or transfer, it was the company's fault;

and while plaintiff was ejected by the subsequent conductor, having the right to do so, the company would be responsible for the acts of both conductors; the company would be responsible, although the conductor of the second car acted right."

(4) Because the general charge given by the jury was erroneous.

(5) Because the judge erroneously charged the jury in the language of Secs. 3066 and 3067 of the code of Georgia, and in connection therewith charged as follows: "That is to say, unless there be aggravating circumstances, you cannot give any except actual damages, but if there be aggravating circumstances, you may give such damages as, in your opinion, would deter the wrong-doer from repeating the wrong, or would be sufficient to compensate the plaintiff for his wounded feelings; and in such case, that is, where there are aggravating circumstances, either in the act or the intention, it is not necessary to prove any special amount of damage; but whether damages should be allowed or not, and, if allowed, how much, are exclusively matters for the determination of the jury."

(6) Because the judge refused, though requested by the defendant in writing, to give the following charges to the jury:

(a) "Exemplary damages can never be allowed in cases arising on contract."

(b) "If the jury find that the plaintiff, Mr. Brauss, got on the Liberty street car of the defendant; that the conductor, in accordance with the rule and custom of the company, demanded his fare or a ticket; that plaintiff failed and refused to pay such fare or produce such ticket; that the rule of the company required the conductor to collect such fare or ticket or to eject the party so refusing from the car, and that the conductor did obey said rule and require the plaintiff to leave said car, then I charge you that the plaintiff is not entitled to recover any damage for such ejection from the said car, in obedience to said rule of said company."

(c) "While a corporation may be liable for the torts of its agents in the prosecution and within the scope of its business, it cannot be made liable for such torts unless the agent himself would be liable; that is, the defendant in this case cannot be made liable for the tortious act of its conductors, Nix and Finney, or either of them, unless they themselves would be individually liable."

(d) "A railroad corporation, when sued for a tort, is not liable to exemplary or vindictive damages unless the officer or agent of the company by or through whom the tort was committed would, if sued, be personally liable to such exemplary or vindictive damages. If, therefore, the jury believe, under the evidence, that Finney, the conductor or agent of the defendant, would not be personally liable, if sued for exemplary or vindictive damages, then the defendant would not be liable for such damages."

(7) Because the judge erred in giving to the jury, at the request of the plaintiff, the following charges in behalf of said plaintiff:

(a) "There is a difference between vindictive and compensatory damages. Vindictive are intended as a punishment upon the wrong-doer, and are inflicted upon the wrong-doer for the purpose of correction or example, to deter the same party or others from the perpetration of a similar wrong in the future. Such vindictive damages are added to the actual compensatory damages. But compensatory damages are allowed to the complaining party as his right, and are intended to make him whole, irrespective of the motive of the wrong-doer, or even of the good faith of the wrong-doer. Even good motives on the part of the wrong-doer, and an honest belief that he is doing what is right and lawful, cannot lessen the damages which the law allows as compensatory, though such honest belief and good motives would generally prevent the imposition of vindictive damages in addition to compensatory damages."

(b) "If the jury find from the evidence that the feelings of plaintiff were wrongfully wounded, and that there were aggravating circumstances in the act or intention, such wounded feelings can be compensated, if the jury find from the evidence in favor of Brauss, even though neither of the conductors bore any malice to Brauss or intended to do any wrong, and only acted in the performance of what they believed to be their duty; now mark this, gentlemen: if they performed what they thought to be their duty in an improper and aggravating manner."

(c) "The plaintiff, Brauss, in order to recover compensatory damages for wounded feelings, need not prove any amount or swear to any amount, though he must prove that he is entitled to that class of damages. The enlightened conscience of the jury is the guide the law prescribes in such cases. The jury can give such damages as the circumstances of each case require, if such circumstances, in their opinion, require any damages at all."

(8) Because the verdict is contrary to the law and the evidence.

(9) Because the jury undertook to find attorneys' fees, though instructed by the court that they could not find attorneys' fees unless they were proved to be due by the evidence, and no evidence whatever having been introduced on the subject of attorneys' fees.

(10) Because said verdict is uncertain and illegal, and no legal judgment can be entered up thereon.

The motion was overruled, and defendant excepted.

Lester & Ravenel and *George A. Mercer*, for plaintiff in error.
R. R. Richards, for defendant.

HALL, J.—The errors alleged to have been committed in the progress of this trial may be conveniently considered under two general heads:

(1st) Is this an action for a tort, or an action upon a contract? Or is there a joinder of the two in different counts of the declaration, or a commingling of both in any of the separate counts?

(2d) If these defects do not exist, did the court, in its charge, lay down the proper rules for measuring the damages, under the testimony; and was the finding of the jury so excessive as to excite suspicion that it was the result of such gross misapprehension or undue bias upon their part as to authorize the judge, in the exercise of a sound discretion, to set it aside and order a new trial?

Wrongs are divided into criminal and civil, and the latter are subdivided into the two classes of wrongs *ex contractu* and wrongs *ex delicto*; the former being such as arise out of the violation of private contracts; the latter, commonly called torts, such as spring from infractions of the great social obligation, by which each member of the State is bound to do hurt to no man. Moak's Underhill on Torts, pp. 3 and 4.

In actions upon cases where the contract has been induced, for instance, by the fraud of the defendant, the party injured may either waive the tort and sue upon the contract, or he may proceed for the wrong. Code, Secs. 2955, 2956; and in that event, the contract will not be counted on, though it will be necessarily shown, in order to make it appear how the wrong was injurious. The tort, in such a case, is connected with the contract only as it enabled the tortfeasors to bring the party wronged into it. Cooley on Torts, p. 90, and cases cited in notes 1 and 2 there. Code, Sec. 2951. If a contract imposes a legal duty upon a person, the neglect of that duty is a tort founded upon a contract. 1 Addison on Torts, Sec. 27. And in such a case, "the liability arises out of a breach of duty incident to, and created by, the contract; but it is only dependent upon the contract to the extent necessary to raise the duty. The tort consists in the breach of duty." *Ib.*, note 1. Private duties may arise from statute, or flow from relations created by contract, expressed or implied. The violation of any such specific duty, accompanied with damage, gives a right of action. Code, Sec. 2954.

Tested by these principles, this is certainly not a suit to enforce a contract. Both the counts in the declaration set forth the duty imposed by the contract, and allege its breach in this respect; they also allege the facts that show the wrong from which the law will presume damages to flow. They aver no special damage in any form, and do not even give the terms of the contract specifically.

To this action the defendant pleaded not guilty, which would not be an appropriate answer to an action *ex contractu*, but it is the proper answer to one *ex delicto*. There was no demurrer to this declaration; but the defendant waited until the plaintiff had

closed his evidence, and then moved to nonsuit and dismiss said action, upon the ground that it appeared, from the evidence and petition filed, that the complaint was for an alleged wrong done by defendant's violation of its contract; that the case, as presented, was a case arising on contract, and that no actual pecuniary loss or damage was proved, and that the only damage claimed was exemplary damage for alleged injury to plaintiff's feelings; which motion was overruled.

Waiving, for the present, the discussion of the character of the damages which the plaintiff was entitled, under his pleading, to prove and to recover, we think, as we have before shown, that this is an action *ex delicto*, founded upon the failure of the defendant to perform a duty imposed by its contract, and that the plaintiff was entitled to recover damages in consequence of this breach of duty, and that the motion was properly overruled.

We are next to consider what was the rule for estimating the damage in this case, and whether, for a breach of such a duty, nothing more than the actual pecuniary loss can be recovered, or whether the plaintiff is entitled to have compensation for his wounded feelings, in consequence of the indignity put upon him. The determination of these questions will dispose of most of the questions made in this case. Let it be borne in mind that the plaintiff had a right, according to the tickets which he presented, to be transported on the defendant's lines of road, from the point at which he entered its cars to his place of destination, and that it was the duty of the defendant to transfer him from one of its lines to another as often as it was necessary to reach the end of his ride; that he was actually transferred by the conductor of the Abercorn to the Liberty street car. It is true he had no transfer ticket, nor did he know that it was necessary for him to apply to the conductor for one; he had, however, stated to the conductor of the first car he entered, where he wished to go. The conductor ought to have known if it was necessary to have this transfer ticket to reach his destination, and should have furnished it. He made the transfer, however, without doing this, and after this conversation the plaintiff had a right to act upon the assumption that all had been done that was necessary to secure his passage; and seeing that such was his impression, the conductor should have furnished the transfer ticket without any further request. It would be going very far to require a passenger to specify to the agents of the company what means and appliances were necessary to the accomplishment of the end he had in view; it is the duty of these agents to supply the tickets necessary under such circumstances. The plaintiff was not in fault, and he should not be made to suffer for the negligence of the defendant's agents. He was properly on the cars with his wife, and had a right to be there until he reached his destination. The demand made on him for his fare resulted

from the wrongful neglect of one of defendant's conductors, and it can make no difference, so far as concerns the duty the company owed him, that it was violated by another conductor, who was unapprised of the actual facts in the case. It was the duty of the first conductor to have communicated to him this information. But it is not clear that he was without fault, for there is sufficient evidence to show that the plaintiff was transferred to his car, and he was so informed by the conductor when the transfer was made. The jury had a right to presume that he had this information, or might have had it, if he had paid proper attention to what was passing, and that it was his duty to take notice of the fact. His failure in this respect put the company in the wrong; and in putting the plaintiff off the car, they are chargeable with a breach of duty which their contract with him imposed. The circumstances under which he was put off, and the place where he and his wife were landed, were well calculated to wound the feelings and mortify the pride of any man of ordinary sensibility. In every tort there may be aggravating circumstances, either in the act or the intention, and in that event the jury may give additional damages, either to deter the wrong-doer from repeating the trespass, or as compensation for the wounded feelings of the plaintiff. Code, Sec. 3066.

This provision of our code is as applicable to the conductors of street cars as to the conductors of railways. It is comprehensive in its terms, and embraces every tort of every character and description, committed by every kind of wrong-doer, and visits upon the offender exemplary damages, or damages to compensate for wounded feelings. Surely it cannot be seriously insisted that there was nothing calculated to wound feelings in the plaintiff and his wife being ordered from the car, in the presence of a number of strangers, and landed in the mud in the middle of the street, when there was a good crossing in close proximity. That there was nothing in this indignity, to characterize it as mildly as possible, that was not well calculated to excite in the beholders thoughts of a very prejudicial and derogatory character to the persons thus dealt with. Is there no aggravation in this act, apart from any intention in the wrong-doer, to excite such unpleasant reflections, and thus inflict a wound upon the feelings, entitling the party to compensation in damages? Is there anything in such conduct on the part of a conductor of a public street railway car to shield him from exemplary damages, in order to prevent the repetition of such offences? Should not a salutary lesson be taught, through this verdict, to impress the necessity of caution upon these persons dealing so largely with the public? These questions have been answered affirmatively by this court in the well-considered case of *Gasways v. The Atlanta & West Point R. R.*, 58 Ga. 216. The court below committed no error in the rule of

damages laid down in his charge, nor in overruling objections to the plaintiff's testimony that his feelings were hurt. The law applicable to the circumstances entitling plaintiff to this action was correctly laid down.

There was no abuse of discretion in refusing to set aside the verdict and grant a new trial upon the ground that the damages found were excessive. To authorize such interference as was invoked, the damages should have been so excessive as to lead the court to infer that they were the result of bias or prejudice upon the part of the jury. Code, Secs. 3067, 2947.

The portion of the verdict that found attorneys' fees, without specifying the amount, was illegal and without meaning, and may, and doubtless will, be disregarded by the court below in rendering its judgment thereon (Code, Secs. 3491, 3493; *Steed v. Cruise et al.*, February term, 1883, not yet published), if, indeed, this has not been already done.

Authorities cited for plaintiff in error: Code, Secs. 2951, 2201, 2203, 15 Am. R. 119; 8 *Id.* 311; 2 *Id.* 39; 53 N. Y. 25; 58 Ga. 216; Pierce, R. R. Law, 491, 492; Code of 1873, Sec. 2082; Wait's Actions and Def., 88 (8), 89; Code, Secs. 3034, 3066, 3067, 2951 (2 and 3), 2953, 2943; 30 Ga., 246, 247; 48 *Id.* 565; Code, Secs. 3073, 3065, 3070; 56 N. Y. 295; 54 Wis. 234.

For defendant in error: 11 Ga., 137, 140, 141; 4 Am. Dec. 475 (a); 1 Sutherland Dam., 158; 53 N. Y. 25; 13 Rep. 542; 9 Am. R., 434, 335; Sutherland Dam., 749, 750; 2 Am. R., 39, 42, *et seq.*: 8 *Id.*, 305, 310.

Judgment affirmed.

See *Pennsylvania R. Co. v. Connell*, and note *infra*.

YORTON

v.

MILWAUKEE, L. S. & W. RY. Co.

(*Advance Case, Wisconsin, November 25, 1884.*)

A passenger who, through the negligence of one conductor, is not furnished with a stop-over ticket to which he is entitled, and who, on attempting to resume his journey after a stop, is required by a second conductor to pay additional fare or leave the train, may elect to leave the train, and in that case may recover from the railroad company, not merely the amount of the additional fare which he is subsequently obliged to pay in order to reach his destination, but all damages sustained by him as the direct and natural consequence of the fault of the first conductor.

APPEAL from County Court, Milwaukee county.

Nath. Pereles & Sons and *E. P. Smith*, for appellant.

A. L. Carey, for respondent.

COLE, C. J.—The sole question in this case is, was the rule of damages which was laid down by the learned county court correct, in view of the facts disclosed on the trial? That rule was, in effect, that the plaintiff was only entitled to recover the additional fare he had to pay to get from Clintonville to Oshkosh, with interest. When the case was here on a former appeal, 54 Wis. 234; s. c. 6 Am. & Eng. R. R. Cas. 322, we thought the charge of the court as to the rule of damages incorrect, because it went upon the hypothesis that the plaintiff was unlawfully put off the train at the Bear Creek station. We held that the plaintiff was not entitled to ride on the second train upon the trip check which he had received from the conductor of the first train, and that, under the rules of the company, the second conductor might demand the additional fare to his place of destination, and, upon the plaintiff's refusal to pay, might eject him from the train at some usual stopping-place, using no unnecessary force for the purpose. We said the second conductor had the lawful right to do this, and was bound to do it, in obedience to a reasonable rule of the company, which required a passenger to obtain from his conductor a stop-over check when he desired to stop before reaching the place to which he had purchased his ticket; and the mistake or fault of the first conductor in not giving him, on request, such a check, would not give him the lawful right to ride on the second train, though he might recover damages against the company for the wrongful act of the first conductor. The court below strictly adhered to this decision, and charged that the plaintiff was rightfully put off the train at the Bear Creek station by the second conductor. And the learned county court seemed to suppose it legally and logically resulted from that view that the plaintiff was confined in his recovery to the additional fare he had been compelled to pay, and interest thereon; but we do not think that conclusion correct when the other undisputed facts of the case are considered. The jury, in effect, found, in answer to the question submitted, that the plaintiff purchased a ticket for Oshkosh, which, of course, entitled him to passage to that place. Further, that conductor Sherman, when he took up this ticket, was informed by the plaintiff that he wished to stop over at Clintonville, and requested the conductor to give him a stop-over check. Thereupon conductor Sherman gave the plaintiff, doubtless through mistake, a trip check as and for a lay-over check. The plaintiff received this check believing it to be a stop-over check. When he entered upon the second train at Clintonville the next morning, he had every reason to suppose that he had the proper voucher for a passage on that train to Oshkosh. But after the train started from Clintonville, he was told by the second conductor, when his ticket was called for, that he could not ride on his train on the check which he had received from the first conductor, and that he must either

pay his fare to Oshkosh or leave the train. He refused to pay his fare, and proceeded on his journey, but concluded to obey the order of the conductor and leave the train at Bear Creek. The question then is, had not the plaintiff the right to adopt this course,—leave the train as he was ordered to do, and hold the company responsible for the fault or mistake of the first conductor? We are clearly of the opinion that he had. And, choosing that alternative, what damages would he be entitled to recover? It seems to us he could recover all such damages as were the direct and natural result of the wrongful act complained of. It is not entirely clear from the complaint whether the action is for a breach of contract, or for a violation of duty as common carrier, though we assume that it is of the latter character. But it can make no essential difference as to the rule of damages upon the facts proven. Whatever damages the plaintiff can show he sustained, which were the direct and natural consequence of the injurious act of conductor Sherman, these the plaintiff may recover.

The learned counsel for the defendant says that the only natural and legitimate result of the act was to compel the plaintiff to again pay his fare from Clintonville to Oshkosh. This might have been the only loss the plaintiff sustained from the mistake of conductor Sherman had he seen fit to pay his fare. But he did not do this, and exercised the option which the law gave him, of leaving the train and looking to the company for redress. The same counsel further says the plaintiff might have protected himself from all loss or inconvenience arising from the fault or mistake of the first conductor at a trifling expense, and that he failed in a social duty by omitting to do so. The jury found that he had sufficient money with him when on the second train to have paid his fare from Clintonville to Oshkosh. But was he under any legal obligation to pay the additional fare exacted? He had once paid for a ticket to Oshkosh, and claimed the right to ride to his destination. Probably most persons having the ability would, under like circumstances, pay the additional fare rather than submit to the inconvenience and delay of leaving the train at that hour and place. But, as we have said before, we think the plaintiff had the option either to pay or leave the train and resort to his legal remedy. There are men who, in social life and business matters, act upon the maxim, "Millions for defence, but not a cent for tribute;" in other words, men who stand upon their strict legal rights. There is certainly a class of cases where the law imposes upon a party injured by another's breach of contract or tort the duty of making reasonable exertions to render the injury as light as possible.

Counsel have referred to authorities which affirm that rule of law. They have also cited cases which hold that a passenger cannot insist upon remaining on the train without paying fare, in order that force shall be used for his expulsion, and then claim damages for the force thus used. But we have not been referred

to a case analogous to this, which decides that it was the duty of the plaintiff to have paid the fare exacted and remain on the train, in order to protect the company against the consequences of the mistake or fault of the first conductor. According to our view, the law imposed upon him no such duty. On the contrary, when he was ordered to leave the train or pay the additional fare, he had an election to leave, or remain on the condition of paying. Having concluded to leave, he has his remedy against the company for his damages, which are not necessarily limited to the additional fare paid subsequently to go to Oshkosh, and interest thereon. The law allows him to recover full compensation for the damages he sustained by reason of the fault of the first conductor. We feel it but just to observe that the conduct of Bartlett, the second conductor, was most considerate, fair and honorable. For while insisting that the plaintiff must pay his fare to Oshkosh or leave the train, he, at the same time, told the plaintiff that if he did pay, on the arrival of the train at Oshkosh he would go with him to conductor Sherman's house, which was only a short distance from the depot, and if Sherman said plaintiff was entitled to passage to Oshkosh, he would refund the money exacted. Thus Mr. Bartlett proposed doing all in his power to make the matter right, while he enforced the rules of his company. His conduct in that behalf certainly deserves commendation.

When this case was here on the first appeal, enhanced damages were claimed because the plaintiff was compelled to leave the train at the Bear Creek station in the night, and was exposed to the chilly air, took cold, became sick, etc. It appeared, then, from the plaintiff's own testimony, that before the train left Clintonville the second conductor demanded fare of him, and told him he could not ride on the trip check which he held, and that the plaintiff had ample opportunity to leave the train at Clintonville. It was in view of this testimony, and of the plaintiff's refusal either to leave the train or pay his fare, that the remark was made that plaintiff should not recover for any exposure or sickness which he had brought upon himself by his own foolish and perverse conduct, he having been rightfully put off the train at Bear Creek. On the last trial the jury found that the plaintiff was not notified by Bartlett he could not ride on his train on the trip check before the train started from Clintonville. This fact was deemed material as bearing on the damages which the plaintiff should recover by reason of the exposure at Bear Creek. There are many cases cited on the brief of counsel on both sides to sustain their respective positions. While we have examined them, we do not deem it necessary to comment on them here. They are all distinguishable from the case before us.

The judgment of the county court is reversed, and the cause is remanded for a new trial.

See *Pennsylvania R. R. Co. v. Connell* and note, *infra*.

HUBBARD

v.

GRAND RAPIDS, ETC., R. Co.

(Advance Case, Michigan, March 6, 1884.)

A passenger bought from a railroad company's ticket agent a ticket which he was informed by the agent was good. As a matter of fact, it was not good, having been previously used. On tender of the ticket the conductor refused to take it, and expelled the passenger for non-payment of fare. In an action against the company to recover damages, *Held*, that if the ticket on its face showed former use and cancellation, the passenger was bound to pay his fare and look afterwards to the company to refund the money and make him compensation for his trouble, but that if he refused to pay his fare and was expelled, he could recover no damages for the expulsion. *Held*, however, that if the ticket was on its face apparently good, the passenger might refuse to leave the car and could recover damages if expelled.

If medical expert testimony is to be admitted in cases of tort, as to the possibility of injurious consequences to the plaintiff's health from mere words, or from the vexation caused by the tort, the parties putting their question to the expert should at least be required to take into account, when considering the possible consequences, the contemporaneous, or nearly contemporaneous, facts that may also conduce to the disturbance of health.

ERROR to Kent county.

E. S. Eggleston, for plaintiff.

D. D. Hughes, for defendant and appellant.

COOLEY, C. J.—The plaintiff sues for being wrongfully threatened with expulsion from the cars of defendant, and compelled to pay fare a second time after he had bought a ticket which the conductor refused to take. It appears that on September 19th, 1882, the plaintiff and one Goodyear were at Manton, on the road of defendant, and about to proceed to the north. They had been together some days. At Manton they bought tickets for Traverse City from the agent of defendant. Plaintiff noticed that the ticket given to him was not like that given to Goodyear, and called the agent's attention to the fact, and inquired if it was good, and was told it was. In this the agent was mistaken. The ticket was one part of an excursion ticket from Sturgis to Traverse City, and had been cancelled from Sturgis to Grand Rapids. The evidence is conflicting as to whether it had not also been cancelled from Grand Rapids to Walton, a station north of Manton. When the ticket was presented to the conductor, he told plaintiff it was not good separated from the other part. He also claimed that it had been used by another person to Walton, and he told the plaintiff he must pay his fare to Walton or he should put him

off the cars. The plaintiff at first refused, and was advised by Goodyear to persist in his refusal, but when the conductor took hold of the bell-rope to stop the train, and, as plaintiff says, put his hand on plaintiff's shoulder, he consented to pay the fare and did so, taking the conductor's receipt therefor. The fare paid was twenty-five cents. The plaintiff then proceeded on his journey.

To show that he was entitled to something more than merely nominal damages, the plaintiff gave evidence that he was not well at the time of the occurrence; that he had a chronic diarrhoea, and he thought the trouble was greater afterward than before. It does not seem, however, to have interfered with his business, which was that of a commercial traveler, nor had it kept him from visiting the houses of ill-fame at Cadillac a day or two before. A physician was put upon the stand as an expert, and was asked whether, if a man afflicted with chronic diarrhoea, and riding upon a public railroad car, should be taken hold of by the conductor, and under a threat to eject him from the car, the person excited under the influence of it, it would have any effect upon his health. The reply was that it would be likely to cause a relaxation of the bowels temporarily.

In submitting the case to the jury, the judge instructed them that if they should find from the evidence that the plaintiff purchased the ticket in question in good faith, and had paid for the same, and only refused to leave the train under an honest belief of having paid his fare, and that the ticket was good from Manton to Traverse City, and that this belief was induced by the assurances of the agent of the company of whom he purchased the ticket, and if there was nothing upon the face of the ticket which would apprise him of any infirmity in it, then any attempt of the conductor to remove the plaintiff from the car by the actual taking hold of his person, or laying his hands upon him for that purpose, was an assault and battery, for which the plaintiff had a right to recover any and all damages naturally and legitimately resulting therefrom. Under this instruction the plaintiff had a verdict for \$366.61.

In *Frederick v. Marquette, etc., R. Co.*, 37 Mich. 342, it was decided that as between the conductor and the passenger, the ticket must be the conclusive evidence of the extent of the passenger's right to travel. No other rule can protect the conductor in the performance of his duties or enable him to determine what he may or may not lawfully do in managing the train and collecting the fares. If, when a passenger makes an assertion that he has paid fare through, he can produce no evidence of it, the conductor must at his peril concede what the passenger claims, or take all the responsibilities of a trespasser if he refuses. It is easy to see that his position is one in which any lawless person, with sufficient impudence and recklessness, may have him at disadvantage, and

where he can never be certain, if he performs his apparent duty to his employer, that he may not be subjected to severe pecuniary responsibility. Such a state of things is not desirable, either for railroad companies or for the public. The public is interested in having the rules whereby conductors are to govern their action certain and definite, so that they may be enforced without confusion and without stoppage of trains; and if the enforcement causes temporary inconvenience to a passenger, who by accident or mistake is without the proper evidence of his right to a passage, though he has paid for it, it is better that he submit to the temporary inconvenience than that the business of the road be interrupted to the general annoyance of all who are upon the train. The conductor's duty, when the passenger is without the evidence of having paid his fare, is plain and imperative, and it can serve no good purpose and settle no rights to have a controversy with him. The passenger gains nothing by being put off the car, and loses nothing by paying what is demanded and staying on.

The plaintiff therefore in this case, if it was found that the ticket he held was not good by reason of former use and cancellation, should have paid his fare when it was demanded, and looked afterward to the railroad company for the refunding of the money, and for compensation for any trouble he might be put to in obtaining it. And it would have been very prudent and proper for him to adopt this course, even though there was nothing on the face of the ticket to apprise him of the invalidity. If the conductor, who was manager of the train, informed him that for any reason the ticket was one he could not receive, a contest with him over it must generally be very profitless, and therefore unadvisable; but we are all of opinion that if the plaintiff's ticket was apparently good, he had a right to refuse to leave the car.

The following cases support *Frederick v. Marquette, etc., R. Co.*, and some of them in their facts closely resemble the one before us: *Townsend v. N. Y. C. & H. R. R. Co.*, N. Y. 295; 15 Am. Rep. 419; *Chicago, etc., R. Co. v. Griffin*, 68 Ill. 499; *McClure v. Philadelphia, etc., R. Co.*, 34 Md. 532; 6 Am. Rep. 345; *Shelton v. Lake Shore, etc., R. Co.*, 29 Ohio St. 214; *Downs v. N. Y. & N. H. R. Co.*, 86 Conn. 287; 4 Am. Rep. 77; *Petrie v. Pennsylvania R. Co.*, 42 N. J. L. 449; s. c., 1 Am. & Eng. R. R. Cas. 253; *Yorton v. Milwaukee, etc., R. Co.*, 54 Wis. 234; 6 Am. & Eng. Ry. Cas. 322; s. c., *supra*. Whether the ticket the plaintiff held was fair upon its face was a disputed question in the case, and must depend for its solution upon the view taken by the jury of the credibility of the witnesses who testified respecting it.

The medical evidence which was given in the case respecting the effect of the alleged assault upon the plaintiff's health, seems to call for some comment. As the assault was a battery only in a technical sense, and there was no pretense of injury except such

as might come from mere words—from the mere expression on the part of the conductor of a determination to put the plaintiff off the car unless he paid his fare—the proposition that it was proper to call expert witnesses to show the possibility of injurious consequences from such words to the plaintiff's health is suggestive of possibilities in the trial of causes which the trial judge may well contemplate with some solicitude. If expert evidence of the sort was admissible in this case, it is difficult to conceive of a case of assault and battery, or of any other case, in which vexing or provoking words are made use of, where the expert witness may not become an important factor in determining the result. But the field for his operations could by no means be restricted to cases in which disturbing words had been made use of. Nearly every case of tort is accompanied by some circumstance which is calculated to annoy and vex the party entitled to sue for it; and if the possible effects upon the mind, and through the mind upon the health, are to be the subject of expert investigation and testimony in a case like this, they must be so at the discretion of the parties in all cases, and the medical witness may become as much an incident to the session of a trial court as the jury itself. Should this ever come to be the case, the parties, in putting their questions to the expert witnesses, should at least be required to take into account—when considering possible consequences—such contemporaneous, or nearly contemporaneous, facts as may also conduce to the disturbance of health, such, for example, as some which appeared in this case, and have been mentioned above. The judge in his instructions evidently attached importance to this expert testimony, and it no doubt conduced to swell the damages awarded.

The case should go back for a new trial.

Sherwood and Campbell, JJ., concurred.

See *Pennsylvania Railroad Co. v. Connell*, and note *infra*.

PENNSYLVANIA RAILROAD CO.

v.

CONNELL.

(*Advance Case, Illinois, October 31, 1884.*)

When a railroad company sells to a passenger a ticket to a point beyond its own line, the coupons attached setting forth that they are issued by the company selling them on account of another company, the said first named company will be considered to act merely as an agent for the sale of the coupons entitling the passenger to ride upon the roads of other companies, and will not be deemed to have entered into any contract with the passenger to transport him through to his destination.

The Penna. R. R. Co. notified the Wabash, St. L. & P. R. R. Co. not to sell

any more through tickets by a certain route which involved passage over the Penna. R. R. Co.'s line. The Wabash, St. L. & P. R. R. Co. agreed not to do so, but subsequently an agent of said company sold to a party a ticket over said route, which, of course, on its face, entitled him to passage. Upon arriving on the line of the Penna. R. R. Co., the conductor, acting upon his instructions, refused to accept the ticket, and as the passenger refused to pay any fare and refused to leave the train, expelled him by force. In an action against the company to recover damages for the forcible expulsion, *Held*, that the Wabash, St. L. & P. R. R. Co. acted as the agent of the Penna. R. R. Co. in selling the ticket, and that the latter was therefore liable for the mistake in the issuing thereof, but *Held*, that it was the passenger's duty, upon being informed by the conductor that his ticket was not good, either to pay his fare or leave the train of his own accord when asked to do so, and then have recourse to an action for breach of contract, or for damages for his expulsion. He could not, by insisting upon remaining in the cars and compelling the conductor to expel him forcibly, entitle himself to damages for the forcible expulsion.

APPEAL from the First District.

Willard & Driggs, for the railroad company.

Hynes, English & Dunn, and *John J. Reddick*, for Connell.

CRAIG, J.—This was an action brought by Wm. J. Connell in the superior court of Cook county against the Pennsylvania Railroad Company to recover damages for a forcible expulsion from appellant's car at Tacona, a station a few miles east of West Philadelphia, on the 10th day of December, 1880. On a trial of the cause before a jury, the plaintiff recovered a verdict and judgment for \$15,000, which was affirmed in the appellate court. It appears from the evidence introduced on the trial, that the Wabash, St. Louis & Pacific Railway Company operated a line of railroad from Omaha to St. Louis, and appellant operated a line of road from Philadelphia to New York. The Wabash Railroad Company had for several years been in the habit of selling coupon tickets to passengers from Omaha to New York over its own line and the lines of the Ohio & Mississippi, The Marietta & Cincinnati, The Baltimore & Ohio, The Philadelphia, Wilmington & Baltimore, and appellant's line. On the 1st day of December, 1880, appellant sent the Wabash Company a message by telegraph as follows:

December 1st, 1880.

George H. Daniels, Wabash, St. Louis & Pacific Railway, St. Louis, Missouri

On receipt hereof, please discontinue sale of tickets to all points north and east of Philadelphia, reading *via* Baltimore & Ohio Railroad and this line. Please answer. L. P. FARMER.

The Wabash Company received the message and replied as follows: "Tickets reading *via* Baltimore & Ohio Railroad to all points east and north of Philadelphia have been ordered off sale." The Wabash notified the Baltimore & Ohio road of the action of appellant, and, on reply, received the following:

“Baltimore, Md., Dec. 2, 1880.

“To Geo. H. Daniels, Wabash R’y, St. L.

“Please get up quickly tickets New York and points east by B. and O., and Boundbrook route trains run Chicago & Cin’ti, N. Y., without change. Coupons should read Balto., Phila., Boundbrook R. R., Phila. & Reading R. R. Phila. & Boundbrook Central R. R., New Jersey, Boundbrook, N. Y. Until you get them on, continue sales Penn. R. R., tickets by B. & O., reporting entire proportion east Baltimore to B. & O.; we are exchanging and will protect. Answer. L. M. COLE.”

On the 7th day of December, 1880, the Wabash Company at Omaha sold appellee, who had no notice of the action of appellant’s, a coupon ticket from Omaha to New York reading *via* Baltimore and Ohio and appellant’s line for the sum of \$38.05, which was paid. Appellee left Omaha on the 7th day of December, arrived at Washington on the 7th; he remained there a few days and then resumed his journey; reached Philadelphia on the 16th, when he took passage on appellant’s cars for New York. When the conductor came into the car in which appellee had taken passage, his ticket purchased at Omaha was presented and refused. The conductor notified appellee that the ticket was not good on that road, and demanded fare, which appellee refused to pay. The train was stopped at Tacona, a regular station, and appellee requested to leave the train, which he refused to do. The conductor then put him off, using such force as seemed necessary for that purpose. Several questions were raised in regard to the rulings of the court below on the admission of evidence, but as they are of minor importance, we will not consume time on their discussion, but will proceed to the main points in the case which are presented by the decision of the court on the instructions to the jury. It is insisted by appellant that the Wabash Company, in the sale of the through ticket from Omaha to New York, contracted as a principal and not as an agent with appellee to carry him over appellant’s line from Philadelphia to New York, and that the refusal of appellant to accept appellee’s ticket was merely a refusal to act as agent of the Wabash Company; and a suit by a third person does not lie against an agent, for the reason the agent refuses to act for the principal. The court refused the instructions of appellant presenting this view of the law, and gave instructions for appellee presenting the view that in the sale of the through ticket, the Wabash Company acted as agent of appellant. The ticket upon its face gives no sanction to appellant’s position; it says: “In selling this ticket for passage over other roads, this company acts only as agent for them and assumes no responsibility beyond its own line.” The coupon over appellant’s line declared: “Issued by the Wabash, St. Louis & Pacific Railway on account of Pennsylvania Railroad.”

From these statements upon the ticket and coupon purchased by appellee, which was the contract between the parties and showed their intentions, it is manifest that the Wabash Company, by its contract with appellee, only assumed to act as agent in the sale of tickets over the connecting lines, and intended to assume the responsibility of an agent and none other. But aside from the language of the ticket, we think the law on this subject is well settled. We think the rule is well stated by Redfield. He says: "As the general duty of common carriers of passengers is different from the common carriers of goods, so the implied contract, resulting from the sale of through tickets for passengers, is different. In the case of the carriers of goods and the baggage of passengers, we have seen that taking the pay and giving tickets or checks through binds the first company ordinarily for the entire route.

"But in regard to carrying passengers the rule is different, we apprehend. These through tickets in the form of coupons, which are purchased of the first company, and which entitle the person holding them to pass over successive roads, with ordinary passenger baggage sometimes for thousands of miles, in this country, import commonly no contract with the first company to carry such person beyond the line of their own road. They are to be regarded as distinct tickets for each road, sold by the first company as agent for the others so far as the passenger is concerned."

2nd. Vol. Redfield on the Law of Railways, Sec. 201.

The same rule is announced in *Harlan v. Eastern Railroad Co.* 114 Mass. 44 and in *Pennsylvania Railroad Co. v. Schwarzenberger*, 45 Pa. State 208. The same principle was announced by this court in *Chi. R. I. and P. R. R. Co., v. Fahee* 52 Ill. 81. It is true a company selling a through ticket might by contract bind itself to be responsible for the entire route, but such liability cannot arise, nor can it be established, from the fact alone that a through ticket has been sold. Something more is required to create a liability of such a character. Several cases, decisions of this court, have been cited by appellant to the effect that where a carrier receives goods marked for shipment to a particular place beyond the line of the carrier, in the absence of an express contract limiting the liability, the law will imply an undertaking on the part of the carrier to transport and deliver the goods at the place to which they are marked, and in such case where loss occurs the carrier receiving the goods is liable to the shipper. Actions for loss of freight are entirely different from an action of this character, and the cases which control the one do not control the other.

Where a coupon ticket has been sold as here, the rights of the passenger and the duty and responsibility of the several companies over which the passenger has procured a passage, are the same as they could have been if the passenger had purchased a ticket at the office of each company constituting the through

line. Note. Vol. 2 Redfield American R. Cases 465. If we are correct in this position, the instructions of the court on this branch of the case are not erroneous. But the instructions in regard to the measure of damages present a more serious question. In regard to the damages, the court in substance directed the jury that the plaintiff was entitled to recover compensation for loss of time or actual pecuniary loss as the result of being forcibly ejected from the train; also such sum as will compensate for injuries to the person resulting from being forcibly ejected from the train and for bodily pain. The conductor had been ordered by his superiors not to receive a ticket for fare over the road like the one presented by appellee, and when, in the discharge of his duty as conductor, he called upon appellee for fare, and the ticket was presented, he notified appellee that he could not receive the ticket, and at the same time informed him that he must pay full fare to New York. This appellee refused to do, and then the conductor notified him that he must pay the regular fare or leave the train. Appellee refused to pay or leave the car, and the conductor stopped the train at a regular station and put appellee off by force; but it does not appear that more force was used than was necessary. This was in substance the transaction. If it be true that appellee by virtue of his ticket was entitled to be carried over appellant's road, the question presented is whether he can recover damages for being forcibly expelled from the train, or was it his duty, when notified by the conductor that he would not receive the ticket, to pay his fare under protest, or leave the train and hold the company responsible for the expulsion, without compelling the conductor to resort to force. Had appellee paid the fare demanded, he might have sued the company and recovered for a breach of the contract; had he left the train when the conductor refused to receive the ticket and ordered him to leave, he might have sued and recovered for all damages sustained in consequence of the act of the conductor expelling him from the train. But can he recover for the force used by the conductor, which he, by his own act, induced the conductor to resort to in order to put him off the train?

A question similar in principle to the one involved in this case arose in *C. B. & Q. R. R. Co. v. Griffin*, 68 Ill. 499, and it was there held: If a passenger pays his fare to a certain station, and the ticket agent inadvertently gives him a ticket to an intermediate station, the demand of a fare a second time by the conductor will be a breach of the implied contract on the part of the company to carry him to the proper station. By paying on such demand, his action will be as complete as if he resists the demand and suffers himself to be ejected, and his ejection in such case will add nothing to his cause of action. It is his duty to pay the fare demanded, and if the company fails to make suitable repara-

tion for the indignity, he can maintain his appropriate action. In *Pullman Palace Car Co. v. Reed*, Reed had purchased a ticket for a particular berth in a sleeping car, and had lost it after entering the car. He refused to pay a second time, and was forcibly expelled after producing proof that he had purchased a ticket for a berth. A verdict of \$3,000 was held to be excessive, and it was also held that the plaintiff was only entitled to recover the price paid for the ticket and reasonable compensation for the trouble and inconvenience he suffered by being deprived of a berth in the sleeping car. See also *Hall v. Memphis & Charleston R. R. Co.*, 9 Am. & Eng. R. R. Cas. 349.

In the case first cited, it was expressly held by this court, that where the passenger paid on the demand of the conductor, his action will be as complete as if he resists and suffers himself to be ejected, and his ejection in such case will add nothing to his cause of action. We entertain no doubt that appellee was entitled to recover the amount of the cost of a ticket from the place he was ejected from the cars to New York. He was also entitled to recover such damages as he sustained on account of the delay occasioned by the expulsion, and all additional expense necessarily occasioned thereby, as well as reasonable damages for the indignity in being expelled from the train; but we perceive no ground upon which he can recover for personal injuries received, unless the expulsion was malicious or wanton. When the conductor demanded that appellee should pay fare or leave the train, he would have been justified in refusing to pay fare and in leaving the train on the command of the conductor, and had he done so, he would have received no personal injuries, and might then have brought his action and recovered as before stated; but when he refused to leave the train and thus compelled the conductor to resort to force, he cannot recover for an injury which he voluntarily brought upon himself. The conductor was ordered by his superior not to receive a ticket like the one presented. This order he was bound to obey, and so far as appears he acted in good faith, and when appellee was notified by the conductor that his ticket was not good and would not be received, it was his duty to leave the train in a peaceable manner, and hold the company responsible for the consequences, rather than resist or undertake to retain his place on the train by force.

A train crowded with passengers, often women and children, is no place for a quarrel or a fight between a conductor and a passenger, and it would be unwise and dangerous to the traveling public to adopt any rule which might encourage a resort to violence on a train of cars. The conductor must have the supervision and control of his train, and a demand on his part for fare should be obeyed, or the passenger should in a peaceable manner leave the train and seek redress in the courts, where he will find a com-

plete remedy for every indignity offered and for all damages sustained.

The instructions in reference to the damages we regard as erroneous, and for this error the judgment will be reversed and the cause remanded.

Mulkey, J., dissents.

Through Contract for Passenger Transportation.—When a through ticket is sold by a railroad company over several connecting roads to a point beyond its own line, this is, in some cases, considered to be a definite contract on the part of the road selling the ticket to transport the passenger through to his destination. *Williams v. Vanderbilt*, 28 N. Y. 217; *Nazac v. Boston, etc., R. Co.*, 7 Allen, 329; *Wilson v. Chesapeake, etc., R. Co.*, 21 Gratt. 654; *Quimby v. Vanderbilt*, 17 N. Y. 306; *Candee v. Pennsylvania R. R. Co.*, 21 Wisc. 582; *Carter v. Peck*, 4 Sneed, 203; *Hart v. Rensselaer, etc., R. Co.*, 8 N. Y. 37; *Weed v. Saratoga, etc., R. Co.*, 19 Wend. 534; *Cary v. Cleveland, etc., R. Co.*, 29 Barb. 35; *Illinois, etc., R. Co. v. Copeland*, 24 Ill. 337; *Croft v. Baltimore, etc., R. Co.*, 1 McA. 492.

Company Selling Through Ticket is Agent for Other Lines.—In other cases the purchase of a through ticket has been regarded as a distinct contract with each road over which the traveler is to pass, the selling company acting as agent for each of the others in making the sale. *Nashville, etc., R. Co. v. Sprayberry*, 9 Heisk (Tenn.), 852; *Hood v. New York, etc., R. Co.*, 22 Conn. 1; *Furstenheim v. Memphis, etc., R. Co.*, 9 Heisk, 238; *Knight v. Portland, etc., R. Co.*, 56 Me. 235; *Hartan v. Eastern R. Co.*, 114 Mass. 44; *Chicago & R. I. R. Co. v. Fahey*, 52 Ill. 81; *Pennsylvania R. R. Co. v. Schwarzenberger*, 45 Pa. St. 208.

See also *Kessler v. New York, etc., R. Co.*, 61 N. Y. 538; *Brooke v. Grand Trunk R. Co.*, 15 Mich. 322.

Expulsion for Non-Payment of Fare or Failure to Produce Regular Ticket.—It is clear that, as a general rule, a railroad company is entitled to expel from its trains a passenger who refuses to pay his fare when it is lawfully demanded. *Haley v. Chicago, etc., R. Co.*, 21 Iowa, 15; *Lillis v. St. Louis, etc., R. Co.*, 64 Mo. 464; *Great Western R. Co. v. Miller*, 19 Mich. 305; *Ohio, etc., R. Co. v. Muhling*, 30 Ill. 9; *O'Brien v. Boston, etc., R. Co.*, 15 Gray, 20; *Chicago, etc., R. Co. v. Roberts*, 40 Ill. 503; *Chicago, etc., R. Co. v. Peacock*, 48 Ill. 253; *Willets v. Buffalo & Rochester R. Co.*, 14 Barb. 585; *O'Brien v. N. Y. Central & H. R. R. Co.*, 1 Am. & Eng. R. R. Cas. 259; *Lane v. East Tenn. Va. & Ga. R. R. Co.*, 2 Am. & Eng. R. R. Cas. 278; *Indianapolis & St. Louis R. Co. v. Kennedy*, 3 Am. & Eng. R. R. Cas. 467; *Swan v. Manchester, etc., R. R. Co.*, 6 Am. & Eng. R. R. Cas. 327; *Skillman v. Cincinnati, etc., R. Co.*, 18 Am. & Eng. R. R. Cas. 81.

Or who fails to produce other than an irregular and improper ticket. *Keeley v. Boston, etc., R. Co.*, 67 Me. 163; *Jerome v. Smith*, 48 Vt. 230; *Pullman Palace Car Co. v. Reed*, 75 Ill. 125; *Frederick v. Marquette, etc., R. Co.*, 87 Mich. 342; *Chicago, etc., R. Co. v. Griffin*, 68 Ill. 499; *Goetz v. Hannibal, etc., R. Co.*, 50 Mo. 272; *Barker v. New York, etc., R. Co.*, 24 N. Y. 599; *Hill v. Syracuse, etc., R. Co.*, 63 N. Y. 101; *Bennett v. New York, etc., R. Co.*, 69 N. Y. 594; *Sherman v. Chicago, etc., R. Co.*, 40 Iowa, 45; *Lillis v. St. Louis, etc., R. Co.*, 64 Mo., 464.

Or who fails to produce any ticket at all, though he may have originally bought one which he has lost or left behind him. *Downs v. New York & N. H. R. Co.*, 36 Conn. 287; *Jerome v. Smith, et al.*, 48 Vt. 230; *Duke & Wife v. Great Western R. Co.*, 14 Upp. Can. Q. B. 377.

Failure to Produce Regular Ticket Caused by Mistake of Company's Servant.—An important question often arises as to the rights of a passenger where he is unable to produce a ticket, or is able to produce only a defective or irregular one in consequence of some fault or negligence of the company's servants. This subject is best considered under three heads.

Total Failure to Produce Ticket.—(1) Where the passenger is unable to produce any ticket at all through the fault of the company's servants. This may occur when the ticket agent at the station has delivered by mistake to the passenger a less number of tickets than he has asked and paid for. *Weaver v. Rome, W. & O. R. Co.*, 3 T. & C. (N. Y.) 270. It also occurs where one conductor has, by an inadvertence, collected a passenger's ticket without informing the subsequent conductor that he has done so. *Shelton v. Lake Shore & Michigan S. R. Co.*, 29 Ohio St. 214; *Townsend v. N. Y. Central & H. R. R. Co.*, 56 N. Y. 295. In neither case can the conductor be expected to listen to the passenger's account of the transaction. It is the duty of the passenger either to pay his fare or to walk quietly off the train, and have resort to an action against the company for the expense and trouble to which he has been subjected. If he attempts to retain his place without paying fare, and is expelled by the conductor, he can recover no damages for the expulsion. A contrary doctrine is laid down in *City & Suburban R. Co. v. Brauss*, 70 Ga. 368; s. c. *supra*. But we cannot believe that this case will be generally accepted as law.

Production of Ticket Irregular on Face.—(2) Where the passenger is, through the fault of the servants of the company, unable to produce any ticket but an irregular or imperfect one, which appears on its face to be irregular or imperfect. This occurs when the ticket agent, by mistake, sells a ticket to the wrong destination. *Frederick v. Marquette, H. & O. R. Co.*, 87 Mich. 342; *Chicago, B. & Q. R. R. Co. v. Griffin*, 68 Ill. 499. Or where a party is informed by the ticket agent that he may travel on a limited ticket, the limitation of which has expired. *Hall v. Memphis & C. R. Co.*, 9 Am. & Eng. R. R. Cas. 348. Or where a conductor gives a party asking for a stop-off check a trip check merely. *Yorton v. Milwaukee, L. S. & W. R. Co.*, 54 Wisc. 234; s. c. 6 Am. & Eng. R. R. Cas. 322; s. c. *supra*. Or where the conductor, by mistake, hands the passenger a transfer slip of the wrong color, not entitling him to ride on the road he wishes, when the passenger has been in the habit of riding on the road and knows that the slip is irregular. *Bradshaw v. South Boston R. R. Co.*, 16 Am. & Eng. R. R. Cas. 386. In all these cases it has been held that it is the duty of the passenger to pay his fare. The ticket being on its face irregular, the passenger cannot expect the conductor to recognize it. He has his action against the company for all the expense and trouble which is a direct consequence of the original mistake, but if he refuses to pay fare and is expelled, he cannot recover damages. A similar result was reached in an analogous case, where a passenger in a sleeping car had lost his ticket, but produced a written certificate from the agent selling it to him, to the effect that he was entitled to a berth. It was held that the conductor was not bound to recognize this certificate, and was justified in expelling the party upon his refusal to pay fare. *Pullman Palace Car Co. v. Reed*, 75 Ill. 125.

In certain cases it has been held that conductors are bound to recognize the validity of irregular receipts or certificates issued by other employes. Thus the conductor is bound to recognize the validity of a pass granted by another conductor, which consists simply of a card marked with the party's destination and the conductor's initials. *Toledo, W. & W. R. Co. v. McDonough*, 53 Ind. 289. See also *St. Louis, A. & C. R. Co. v. Dalby*, 19. Ill. 353.

It must also be observed that in some cases it has been held that the agents of a railroad company have no right to modify by parol the express terms of a ticket. A conductor has no right to grant verbally to a passenger holding a continuous ticket the right to stop over. *Petrie v. Penna R. R. Co.*, 42 N. J. L. 449. A ticket agent at a way station, where a passenger has alighted, cannot grant him the right to proceed on a subsequent train where the check which he holds is limited to "this day and train only." *McClure v. Phila. W. & B. R. R. Co.*, 34 Md. 532. In both these cases, the passenger attempting to continue his journey on such tickets, and refusing to pay fare, may rightfully be expelled by the conductor.

Production of Irregular Ticket Valid on its Face.—(3) Where the passenger is, through the fault of the servants or agents of the company, unable

to produce a regular ticket, although the ticket held by him appears on its face to be good. This is the state of facts in the two cases of *Hubbard v. Grand Rapids R. Co.*, and *Pennsylvania R. Co. v. Connell*, reported above. It is obvious that a new element is here introduced not involved in the previous cases. It will be observed that the two decisions are by no means harmonious. We incline to the opinion that the Supreme Court of Illinois states the law as it will ultimately be established.

LOUISVILLE & NASHVILLE R. R. Co.

v.

FLEMING.

(*Advance Case, Tennessee, 1884.*)

The rule of this State, in the case of contributory negligence, is, that if the injured party proximately contribute to the injury, he cannot recover damages, nor can he recover if both parties are equally in fault, but he may recover if the negligence of the other party was the proximate cause of the injury, although he may have contributed to the injury by his own negligence, such negligence going only in mitigation of the damages.

The negligence or wrongful conduct of the injured party may be considered in mitigation of damages, whether the damages recoverable be only compensatory or compensatory and exemplary.

The rule is applicable to all cases of contributory negligence, and is not confined to cases growing out of statutes regulating the duties of railroad employes on a moving train when an obstruction appears on the track.

A person who purchases a ticket which entitles him to be carried as a passenger in a railroad train, takes it subject to such reasonable rules and regulations as the railroad company may have prescribed, and regulations would be reasonable which provided that the passenger should, on demand, exhibit his ticket on entering the train, and should afterwards, on like demand, surrender his ticket or pay the fare under the penalty, in case of failure, of removal from the cars.

The reasonableness of a rule or regulation of a railroad corporation is a question for the determination of the court, not the jury.

There is no distinction, so far as it affects the relative rights of the parties, whether a ticket be lost or mislaid by a passenger before or after going upon the train.

The exhibition of his ticket by the passenger to the employé in attendance for the purpose upon entering the train, will give the passenger no other or different rights than if he had not exhibited it.

A passenger who loses or mislays his ticket after entering the cars has no right to supply its place by offering testimony that he actually bought the ticket and lost it, and the conductor or other employé whose duty it is to take up the ticket cannot be required to hear testimony on the subject, or to determine its weight at the peril of the company under a rule which gives him no discretion.

Persons laboring under physical infirmities or otherwise unable to take care of themselves who travel on railroad trains, must provide proper assistance for themselves, and it is not the duty of the conductor, in the absence of instructions from the company, to render such assistance.

The conductor of a railroad train cannot be required to search the pockets of a passenger for his ticket, and, of course, if he consents to search a particular pocket at the request of the passenger, he is not bound to search further, it being the duty of the passenger to produce and deliver his own ticket on demand.

If, however, the conductor does, at the request of a passenger, undertake to search for the passenger's ticket, he should do so properly and in good faith, but only to the extent of the request, and if, acting in good faith and with ordinary diligence, he fails to find the ticket, neither he nor the company would be liable for the consequences of the failure; nor would they be liable if the passenger were guilty of equal or greater negligence.

If the conductor, after yielding to the request of the passenger to search for his ticket in a particular pocket, merely pretended to do so, or performed the act in so grossly negligent a manner as to indicate a wanton and wicked purpose to disregard the rights of the passenger, or to wilfully inflict on him an injury, the company would be liable in exemplary damages, the negligence of the passenger going only in mitigation of the recovery; in every other contingency, if the company be liable at all, being itself free from fault, the damages would only be compensatory.

When a passenger has been removed from a railroad train wrongfully, the company would be liable for the ordinary and natural results of the act, and therefore such as might have been reasonably expected, in view of the duty of the passenger to exercise ordinary care to so act afterwards as to prevent injury.

The plaintiff in this case, an old colored man whose hands were partially paralyzed, had taken passage on the defendant's train from Franklin to Nashville, and for failing to produce his ticket or pay his fare on demand, was about eight o'clock at night put off at a station nine miles from Nashville, where there was a depot building and thirty or forty houses, many of them occupied by persons of his own race and color, and thereupon, although the night was cold with snow on the ground, and snowing and sleeting, he undertook to walk to Nashville, and did so. It was held that the injuries caused by the walk, if any, would not be the proximate result of the removal from the cars, unless after reasonable effort at the station he failed to find shelter or conveyance, nor then, if his failure, in the opinion of the jury, was due to his negligence in not having with him money to pay for the accommodations demanded, rather than a proximate result of the removal.

Bond & Henderson, and Ed. Baxter, Attys. for L. & N. R. Co.

H. H. Cook, Wm. House, Bate & Williams, Attys. for Fleming.

COOPER, J.—This is an action brought by Fleming against the R. R. Co. to recover damages for an alleged wrongful ejection from the company's train of cars while traveling from the town of Franklin to the city of Nashville. The verdict and judgment below were in favor of Fleming, and the company appealed in error. The referees have reported that the judgment should be reversed for an error in the charge of the trial judge to the jury. Both parties have filed exceptions, which open the whole case.

Fleming is a colored man, eighty-three years of age at the time of the occurrence, whose hands were partially paralyzed and numb, so that he could not readily grasp any little thing, nor even feel it, when between his fingers. He lives in Williamson county with his son, William Fleming, and had two daughters, who reside in the State of Kansas; one of these daughters was on a visit to him, and he intended to return with her to Kansas. On January 2d, 1879, this daughter took the plaintiff's clothes and money and

went from Franklin to Nashville on an express wagon to purchase through tickets to Kansas for her father and herself. He was to follow on the night train of the railroad company, and meet her at the Louisville depot at Nashville. The plaintiff's son William took him to the depot of the company at Franklin and bought a ticket for him to Nashville, which he put into the left-hand pocket of his father's vest, telling him that the conductor on the train would call for it, and to let him have it. The son assisted his father to get on the train, telling the brakeman of the company, whose duty it was to see that those persons who entered the train had tickets, that his father had a ticket in his pocket. He placed his father in a seat, and gave him the instruction mentioned, that the conductor would call for his ticket before the cars had gone very far, and when he did, to give it to him. He then stepped back toward the door, and, meeting the brakeman, pointed out his father to him, saying that he was old, feeble, and partially paralyzed, and was going to meet his daughter at the Louisville depot at Nashville; that he did not know one depot from another, and requested the employé to see that he got off at the Louisville depot. The employé replied, "All right."

Before the cars had gone far the conductor did call upon the plaintiff for his ticket. The plaintiff saw him coming, taking up tickets, he says, and began to hunt for his ticket, and could not find it. He told the conductor his hands were paralyzed, and asked him to put his hand in his left-hand pocket, designating the pocket by placing his own hand on it, and get it out for him. The conductor did put his fingers in the pocket, "flipped them along, just brushed them through like," says the plaintiff, and told him he had no ticket. The plaintiff then said that his son had bought him a ticket, and put it in his vest pocket. There were several colored persons in the car, who had got on the train at Franklin, and knew the plaintiff well. Two or three of these passengers spoke up, and said that the plaintiff's son had bought a ticket as the plaintiff claimed, and put it in his father's pocket. The conductor testifies that he examined the pocket carefully and found no ticket, and then, with the aid of his lantern, searched the seat and the floor, to see if the ticket had been dropped. The other testimony is in conflict as to this search. The conductor told the plaintiff that if he did not find the ticket by the time he came back, or pay him the fare from Franklin to Nashville, 95 cents, he would put him off at the next station. The plaintiff told the conductor that his daughter had his money at Nashville, and offered to pay him when he got to the depot, where he expected to meet her. He also tried to borrow the money from his fellow passengers. A white passenger then told him if he had paid for his ticket, he could not be put off the cars. This quieted the plaintiff, and he did nothing further. He did not even request

any of his fellow townsmen to examine his pockets or search for his ticket. The conductor, after going through the train taking up the tickets, returned to the plaintiff, who was unable to produce a ticket or the money. The conductor then instructed the brakeman to put the plaintiff off at the next station, which he did, the plaintiff offering no resistance, but going off quietly. He himself testifies that the conductor and brakeman did not speak to him harshly, and that he was not roughly handled when put off the train.

The plaintiff was put off at Brentwood, a station half-way between Franklin and Nashville, being about nine miles from each place. It is a small town of 30 or 40 houses, many of them occupied by colored persons, with a depot house near the road. It contained no public house or livery stable. He was put off about eight o'clock at night. It was a very cold night, with snow on the ground, and sleeting or snowing at intervals. The plaintiff made no effort to obtain shelter for the night at Brentwood, either from the depot agent or any of the citizens. By the persuasion of another negro, who also got off the cars at Brentwood because he had no money to pay his fare any further, the plaintiff was advised to go with him on foot to Nashville at once. They reached Nashville between eleven and twelve o'clock at night, the plaintiff suffering much from the cold and the exertion. On the next morning the plaintiff's daughter either found the ticket in the father's left vest pocket, as she testifies, or in some other part of his clothes. She says, "I put my hand in his pocket, and the first thing I felt was the ticket." They went to the office of the company, and upon presenting the ticket were paid 50 cents for it. The plaintiff went on that day to Kansas, where he remained several months before returning home. There is testimony tending to show that the plaintiff had hernia on one side before the occurrence, and has since been afflicted with hernia on both sides, and with hydrocele.

The trial judge, from the burden of his charge, was of the opinion that the jury might find that the plaintiff was entitled to exemplary as well as compensatory damages. And in view of the settled law of this State, he charged that if the defendant was guilty of a wrong, by which the plaintiff was injured, and plaintiff was also in some degree negligent, or contributed to the injury, it should go in mitigation of damages. He then added, "But the doctrine of contributive negligence has no application to an action for intentional tort or wilful neglect, or actual wrongful act of the defendant. If it were a reckless or wanton act of the carrier's in expelling the plaintiff from the train, the carriers can claim no protection from contributory negligence, even in mitigation of damages." This was the part of the charge which the referees have reported to be erroneous.

The intrinsic difficulty of the subject of contributory negli-

gence has led to three distinct lines of decision. In England and a majority of the States of the Union, the negligence of the plaintiff, which contributes to the injury, is held to be an absolute bar to the action. In the States of Illinois and Georgia, the doctrine of comparative negligence has been adopted; that is, if, on comparing the negligence of the plaintiff with that of the defendant, the former is found to be slight, and the latter gross, the plaintiff may recover. In this State we hold that although the injured party may contribute to the injury by his own carelessness or wrongful conduct, yet if the act or negligence of the party inflicting the injury was the proximate cause of the injury, the latter will be liable in damages, the negligence or wrongful conduct of the party injured being taken into consideration by way of mitigation in estimating the damages. In other words, if defendant was guilty of a wrong, by which plaintiff is injured, and plaintiff was also in some degree negligent, or contributed to the injury, it shall go in mitigation of damages, but cannot justify or excuse the wrong. *East Tenn., Va. & Ga. R. Co. v. Fair*, 12 Lea, 35. At the same time, we hold that if a party by his own gross negligence bring an injury upon himself, or proximately contribute to such an injury, he cannot recover. Neither can he recover in cases of mutual negligence when both parties are equally blameable, *Id.* The principal difference between our rule and the English rule, as modified by the more recent decisions, is in allowing the damages to be mitigated by the conduct of the injured party. In this respect our rule meets the objection which Mr. Thompson in his notes on contributory negligence makes to the construction put by some of the courts on the English rule, or to the application of the rule to particular cases. "It is," he says, "nothing more than a declaration that although both parties have been guilty of negligence contributing to the injury, the party who suffered the damage is to be completely exonerated, and the other party is not to be exonerated to any extent. The former is to recover of the latter, without any abatement on account of his own share of the fault, all the damages which he has suffered. This is, he adds, manifest injustice; and yet it is practiced every day in the courts of England and in those of nearly every State in the Union." 2 *Thomp. on Neg.*, 1,155. Our rule, moreover, is merely an adaptation of the law which prevails in civil actions for assault and battery, where the conduct of the plaintiff in the way of provocation is always admissible in evidence to mitigate the damages. *Jacaway v. Dula*, 7 Yer., 82; *Chambers v. Parton*, 5 Cal., 273, 280; *Smith on Dam.*, 745. It is obvious, however, that in States which have adopted a different rule from ours in relation to the effect of contributory negligence the decision of their courts must be received with caution on the question of damages. In New York and other States where the English rule prevails,

the plaintiff is entitled to compensatory damages without reference to his own conduct, but it has been intimated that if the plaintiff claims exemplary damages in a case which warrants the claim, his language and conduct may be shown in mitigation of the recovery. *Vedder v. Fellows*, 20 N. Y., 126. A like intimation is made in *Matthews v. Warner*, 29 Gratt., 570. And the courts of these States all hold that the defendant will be liable wherever his conduct has been such as to justify the finding of exemplary damages—that is, where it has been reckless and wanton, although the plaintiff was a trespasser, and did not use ordinary care to avoid the injury, or otherwise acted wrongfully. *Cooley on Torts*, 674; *Sanford v. R. R. Co.*, 23 N. Y., 346; *Mulherin v. R. R. Co.*, 81 Penn. St., 368; *R. R. Co. v. Adams*, 26 Ind., 78.

Our decisions are that plaintiff's negligence or wrongful conduct may be considered in the mitigation of damages, whether the damages recoverable be compensatory only, or compensatory and exemplary, that is to say, whether the defendant's conduct has been merely negligent. The question came before the court in cases growing out of our statutory regulations in regard to what precautions should be taken by the employes of a running railroad train, when a man was on the track, and it was laid down generally that the jury might look to the negligence of the injured party in mitigation of damages. Some of these were cases of compensatory and others of exemplary damages. *R. R. Co. v. Carrol*, 6 Heisk., 347; *R. R. Co. v. Smith*, 6 Heisk., 174; *R. R. Co. v. Burke*, 6 Cold., 45; *R. R. Co. v. Nowlin*, 1 Lea, 523. Even in those States in which the conduct of the plaintiff is not allowed to be looked to in mitigation of compensatory damages, the rule is otherwise as to exemplary damages. Of course, there could not have been any doubt that the latter rule would prevail in like cases in this State. The only doubt could have been as to the mitigation of compensatory damages. The question was directly raised and decided in *R. R. Co. v. Conner*, 2 Baxt., 382. In that case, after charging the jury that they might look to the conduct of the company's agents to see whether there were circumstances of aggravation, with a view of assessing exemplary damages, the trial judge said: "And when, considering this question of exemplary damages, it would be proper for the jury to take into consideration the condition of the deceased at the time of the accident, and as to how far his condition and conduct, his carelessness, recklessness and imprudence contributed to the result. But remember, you are not to consider these facts in fixing the liability of the company, or in assessing the direct or pecuniary damages resulting to the party from the injury sustained, for as to them, the statute makes the company fully liable, when liable at all." In other words, his honor charged that the jury might look to the conduct and negligence of the plaintiff in mitigation of exemplary dam-

ages, but not of compensatory damages. The correctness of the charge, so far as the exemplary damages were concerned, was taken for granted by the counsel and the court, the contest being on the clause relating to compensatory damages. This court said: "This charge, so far as it holds that the condition and conduct, recklessness and imprudence of the deceased are not to be considered by the jury in assessing the direct pecuniary damages resulting to the party from the injury, was erroneous." The negligence and conduct of the plaintiff will go therefore in mitigation of compensatory damages, and *a fortiori* of exemplary damages in these railroad cases under the statute.

But it has been well said by Judge Freeman, the statute in its requirements embodies no more than the common law and every other enlightened system of jurisprudence demands of its citizens. The statute has only shifted the burden of proof. "It never was the law that any citizen would not be responsible if he saw another on his track, even a trespasser, and rode over him when he could have avoided it." *R. R. v. Humphreys*, 12 Lea, 200-206. The same principle would, therefore, be applicable in other cases of contributory negligence not within the statute; and as it was expressly held, when the injured party fell through the hatchway of a store into which he had accompanied his mother who went into the store for the purpose of buying an article sold therein. *Dush v. Fitzhugh*, 2 Lea, 307. And so in a civil action against an individual for damages for the killing of the plaintiff's intestate by shooting, this court said that the illegal conduct of the deceased at the time of the killing, tending to provoke the defendant to shoot, might be looked to by the jury in assessing the damages. *Marks v. Brown*, 1 Baxt. 87. And there is no reason why the same rule will not apply to any case of contributory negligence, where plaintiff's conduct or negligence has been such as to charge him with some blame in the matter of the injury complained of. In this view, the charge of the trial judge upon the point under consideration was erroneous.

The trial judge, after stating that the R. R. Co. was authorized to charge and receive compensation for the carrying of passengers, and to prescribe and enforce reasonable rules and regulations for the government of those passengers under the contract of carriage, proceeded thus: "If the plaintiff purchased a ticket from the defendant's officer at Franklin to Nashville, that entitled him to admittance into defendant's cars, and to be carried safely from the one point to the other, and the company had a rule requiring persons before entering the train to exhibit their ticket, or to afford other satisfactory evidence to the officers entrusted with the duty (to see) that they had a ticket, it would be the duty of the passenger to comply with the regulation, this being a reasonable, proper rule. When the passenger has complied with this requirement,

he then becomes entitled to the right to ride upon the train to the place for which the ticket calls. The purchase of and payment for a ticket constituted a contract, which the passenger has a right to have executed by the company, under such legal and reasonable rules and regulations for his conduct in the train as the company may have prescribed. It would be a reasonable regulation to demand of passengers the exhibition and surrender of their tickets, and a passenger wilfully refusing to comply with reasonable regulations of this character forfeits his right to further carriage. But if the passenger purchased a ticket, and the conductor knew or had satisfactory evidence that he had accidentally lost it, he has no right to expel him from the train. It is not the ticket alone that entitles him to be carried, but the contract he has made and the payment of his money. The ticket is only an evidence of the contract and of his right under the contract. If the passenger has actually purchased a ticket, and by accident, after he has entered the train, loses it, he will not by that alone be deprived of his rights acquired under the contract. In that case it will devolve on the passenger to produce reasonable and proper evidence of the fact that he purchased and lost his ticket. The evidence required in such case will be just such testimony as would be sufficient to satisfy a reasonable man of any other fact. Therefore, if the plaintiff purchased a ticket to Nashville, and on the faith of it was admitted on the train (whether, as his honor elsewhere says, actually shown, or only offered to be shown), and afterwards lost or mislaid it, so that it could not at the time be found, it was his duty to show to the conductor, by such evidence as I have mentioned, these facts. Upon doing so, he would be entitled to the rights he acquired by the purchase of the ticket and its possession. And if, after the production of such testimony, the conductor or officer demanding the ticket refuses to accept it, and expels the passenger, he does it at his peril, and the company would be liable in damages for the act of its agent or officer. * * * If, therefore, you are satisfied from the evidence that the plaintiff purchased a ticket at Franklin to go to Nashville, and when, being placed on the train, the officer at the door admitted him upon such evidence as he was willing to accept of that fact, the plaintiff then became a passenger, and was entitled to be carried safely to his destination. If, then, when the other officer came around demanding tickets, the plaintiff could not find his, and he offered to produce, and did produce, proper and legal evidence of the fact that he had purchased a ticket, the carrier would have no right to eject him, for two reasons: First—The officer receiving him into the train, and who was charged with the duty of ascertaining in advance that persons entering had tickets, knew the fact (and knowledge on the part of the agent is knowledge on the part of the principal), the company then would know that he had a ticket,

and no other agent would have a right to disregard that knowledge. Second—The second officer would have no right to disregard evidence that would be sufficient to satisfy a reasonable mind of any other fact. In such case the act would be wrongful and the defendant responsible.”

When we come to analyze this charge, we find it contains several distinct propositions, some clearly expressed, and others necessarily to be inferred, in order to come to the conclusion reached. They may be condensed thus:

First—Lying at the foundation of the charge, although not stated in so many words, is the idea that there is a distinction between the loss or mislaying of a ticket before and after going upon the train, so that it cannot be produced when lawfully demanded by the conductor under a rule or regulation of the company which they are authorized to make.

Second—The purchase of a ticket constitutes a contract which the passenger has a right to have executed by the company under such reasonable rules and regulations as the company may have prescribed; and it would be reasonable to demand of passengers before entering the train to exhibit their tickets, and afterwards the exhibition and surrender of their tickets.

Third—But if the officer of the company at the door of the train admit a passenger “upon such evidence as he was then willing to accept,” that the passenger had a ticket, then the knowledge of that officer of the passenger’s having a ticket would be knowledge of the company, and the conductor, whose duty it was to subsequently take up the tickets, could not disregard that knowledge.

Fourth—And if the passenger who has purchased a ticket by accident loses it after he has entered the train, he may supply its place by producing such testimony that he purchased and lost his ticket as would be sufficient to satisfy a reasonable man of any other fact.

Fifth—It is a necessary inference, from the foregoing proposition, that if the rule of the company requires the conductor to put the passenger off unless he purchases a ticket, or pays the fare, the conductor must not obey the rule, but must hear the testimony offered by the person that he had purchased and lost the ticket, and at his peril, and at the peril of the company, determine whether it is such “as would be sufficient to satisfy a reasonable man of any other fact.” Obedience to the rule of the company is not made to depend on the reasonableness of the rule, but upon the exercise of the judgment of the conductor on such evidence as the passenger may see proper to produce.

We are afraid that not one of these propositions, except the second, which only embraces the general right of a holder of a ticket subject to the rules and regulations of the company, can stand the test of either reason or authority.

His honor the trial judge correctly conceded the right of the company to make reasonable rules and regulations touching the exhibition and surrender of their tickets by passengers, all the authorities concurring as to the existence of the powers, and that such rules and regulations became a part of the contract between the company and the purchasers of its tickets. *Trotlinger v. R. R. Co.*, 11 Lea, 533. It was shown in proof in this case that the company did have a rule requiring brakemen to be posted at the door of the car to see that passengers exhibited their tickets before entering; and another rule thus worded: "Passenger conductors are allowed no discretion, but are required to collect a ticket, pass, or cash from each and every person who rides upon their train, except certain officers of the company." By another rule the conductor is authorized to request passengers to leave the train, "if the nature of the case justifies it," at the first station, and to use the least force necessary to expel the passengers.

The rules and regulations of a railroad corporation, as of other corporations, are subject to the requirements that they must be reasonable. Whether they are reasonable or not is a question for the court and not for the jury, and this for the obvious reason that there must be uniformity in the construction, which can always be obtained by the decisions of this court. If left as a question of fact for the jury, the result might vary with each jury, and the corporation could have no certainty that any rule would stand the test with every jury. Ordinarily, too, jurors are not aware, and cannot readily be made aware, of all the reasons calling for the rule. *Vedder v. Fellows*, 20 N. Y. 126.

His honor the trial judge, although he indulges in some severe comments on unreasonable regulations, does not say in so many words that the rules in question are unreasonable. His idea seems rather to be, that no matter how positive the language of the rule is, it must be considered as subject to the qualification that in particular cases their enforcement must be left to the discretion of the conductor, at the peril of the company. But if the element of discretion is once introduced, there is no longer any rule, whether it be unlimited discretion of the conductor, or a discretion to be subject according to his honor's views to the subsequent revision of a jury. The referees, or rather a majority of them—the other referee dissenting—take the same view as the circuit judge. They concede that a railroad company may lawfully eject travelers from their cars for non-production of a ticket, and that such a rule is reasonable, and perhaps beneficial to the company and the traveling public, but think there should be some exception to it, and that the case made in the record is a proper exception. But they do not undertake to say how such exceptions can be grafted on the rule without in effect abolishing the rule by making it depend on the discretion of the conductor, which in that event ought to be final,

or in the verdict of a jury in each particular case. Rules requiring passengers to purchase their tickets, or surrender them when demanded by the conductor, and authorizing the passenger to be ejected from the cars on his failure to do so, have been repeatedly sustained by the courts. *Hibbard v. R. R. Co.*, 15 N. Y. 455; *Jerome v. Smith*, 48 Vt. 230; *Frederick v. R. R. Co.*, 37 Mich. 342; *Townsend v. R. R. Co.*, 56 N. Y. 297. No authority has been produced to the contrary.

The case of the *Pullman Car Co. v. Reed*, 75 Ill., 125, is altogether different. There the passenger had purchased a ticket for a sleeping berth in the company's car, which was assigned to him, but having lost his ticket before the train started, he procured from the ticket agent a certificate, directed to the conductor, that he had paid for the particular berth, designating it. It was held that he was wrongfully ejected, because, the berth being designated and assigned, it was reasonably certain that the company could not be defrauded by the lost ticket falling into the hands of another person, who might claim that berth. No such protection exists in the case of a passenger ticket for carriage. In *Hibbard's* case above, the conductor had previously called for and seen the plaintiff's ticket, and a fellow passenger assured the conductor that the plaintiff's fare was paid and that he had a ticket, yet the ejection of the passenger for his refusal to show his ticket was held to be lawful. In *Jerome v. Smith*, *ut supra*, the loss of a check given for one coupon of a ticket taken up by a former conductor, the ticket showing the passenger's starting point, yet it was held the passenger was not entitled to any recovery. The other New York case was where the conductor had taken the passenger's ticket without giving any check, and a subsequent conductor had ejected the passenger for refusing to pay fare. In the Michigan case the ticket agent had given the passenger a ticket to a point short of that to which the passenger had paid, and, upon his refusal to pay the additional fare not covered by the actual ticket, it was held that he was properly ejected. The court comment upon the impracticability of going into an investigation in such a case of outside facts, and say: "There is but one rule which can safely be tolerated with any decent regard for the rights of railroad companies and passengers generally. As between the conductor and passenger, and the rights of the latter to travel, the ticket produced must be the conclusive evidence, and he must produce it when called upon, as the evidence of his right to the seat he claims."

It is obvious from the very nature of things that there can be no distinction in the rights of a passenger whether he loses or mislays his ticket before getting on the train or afterwards. The risk of the company is precisely the same in either event. And the knowledge of the officer who sees the ticket at the door of the

car can have no more effect in the one case than the knowledge of the ticket agent who sells the ticket to the particular passenger can have in the other. The knowledge of the latter official would be as much the knowledge of the company as the knowledge of the brakeman. And the conductor cannot be required by the production of testimony to make an exception to a rule which gives him no discretion. He is not clothed with any authority to hear evidence, or to determine its weight at the peril of the company, nor to occupy his time in such an investigation. "There is but one rule which can safely be tolerated with any decent regard to the rights of railroad companies and passengers generally." "The company," says Denio, C. J., in the *Hibbard* case, "had a test far more convenient to all concerned than the taking of testimony, to wit, the exhibition of their own ticket."

The trial judge also charged the jury, "If the conductor see, or know, or have information that he is feeble and paralyzed, or from other physical infirmities be unable to properly use his hands or body, and to make diligent search himself for his ticket, and request the officer to assist him in doing so, it is the duty of the officer to render such assistance as the passenger may request, and to render it properly and in good faith, and if he refuse and fail to do so, it would be negligence on his part; and if, without making a careful examination as the passenger requests, and using reasonable diligence in searching for the ticket, he expels the passenger, and it should turn out that he did in fact have a ticket, which could have been found with reasonable diligence, the expulsion would be unauthorized, and render the company responsible for the consequences of the act." In support of this charge we are referred to *Shenden v. Brooklyn, et al. R. Co.*, 36 N. Y., 39, where the plaintiff's intestate, a boy of nine years of age, was killed by the negligence of the conductor of a street railroad.

In considering the proposition which the court was requested by the company to charge, "that the fact that the deceased was a child made no difference in the application of the rule of law as to the question of negligence," the court said: "A sick or aged person, a delicate woman, a lame man, or a child is entitled to more attention and care from a railroad company than one in good health and under no disability. They are entitled to more time in which to get on and off the cars. They are entitled to more consideration when crossing a street, to the end that the cars shall not run over them." The eminent judge, afterward Mr. Justice Hurst, of the Supreme Court of the United States, adds: "No one, whether sick, lame, imbecile, or vigorous and youthful, is bound to exercise all the skill and all the care that the most capable and ready witted person could command. Ordinary capacity and ordinary care and attention in protecting themselves is all that the law requires. This each is bound to give, whatever his age or

condition, and, if he cannot, call upon others to supply his deficiencies or to compensate him for losses arising from its absence."

We do not understand that it is the duty of a railroad conductor to render assistance to a passenger laboring under physical infirmities, or that the latter has the right to call upon him for such aid. On the contrary, the rule is that persons unable to take care of themselves must provide proper assistance. *New Orleans St. R. Co. v. Statham*, 42 Miss., 607; *Willetts v. Buffalo R. R. Co.*, 14 Barb., 505. If, however, the conductor does, in accordance with the request of a disabled passenger, undertake to search for his ticket, he should do so properly and in good faith and with reasonable diligence, but only so far as the passenger himself asks. If the passenger limits his request to a search of one pocket, which he designates, the conductor is not bound to search further. If the conductor, acting in good faith and with reasonable diligence, fail to find the ticket in the pocket indicated by the passenger, neither he nor the company can be held liable for the consequences of the failure. And if the conductor—the ticket being actually in the pocket designated—fail to find it, merely because he did not exercise ordinary or reasonable diligence, neither he nor the company would be liable if the passenger were guilty of equal or greater negligence in the matter. If, for example, the passenger directed the conductor to the wrong pocket, or if the ticket was not actually in the pocket, or if the passenger, in the opinion of the jury, was guilty of equal or greater negligence in not making a more thorough search with the aid of his colored friends then present, there could be no recovery if the conductor acted in good faith. The case would in that view be one of those casualties the consequences of which could not be thrown upon a third party.

The law governing the recovery of damages is now well settled, the difficulty not being in its general principles, but in their application to particular facts. Actual compensation is the ordinary measure of damages, a departure from which is only made in exceptional cases. *R. R. Co. v. Smith*, 6 Heisk. 174. If the wrong be done by a person acting under a mistaken sense of duty without any wrongful intent, and without any violence or indignity to the aggrieved party, it is a case for compensatory and not exemplary damages. Where the wrongful act is done from a bad motive, or so recklessly as to imply a disregard of social obligations, or where there is negligence so gross as to be equivalent to positive misconduct, exemplary damages may be awarded. The turpitude of defendant's conduct is alone considered to justify the assessment of such damages, and there must be a wrong intent on his part, or the wrongful execution of an honest intent. Where, therefore, a passenger in a railroad train was wrongfully ejected at a regular station for the non-payment of the fare illegally demanded,

the conductor acting in good faith, under the instructions of the company, the act being done in a peaceable manner without violence, malicious intent or improper conduct, this court held that the passenger would not be entitled to recover exemplary damages, the company itself not being fixed with any malicious intent in the instructions given either to the particular passenger or to the passengers generally. *R. R. Co. v. Guinan*, 11 Lea, 98; s. c., 13 Am. & Eng. R. R. Cas. 37. The law has been settled in the same way by the court of appeals of New York, and it has been held by that court that where a railroad conductor, acting in what he believed to be the performance of duty to the company, removed a passenger who refused to produce a ticket or to pay fare, although the removal was unlawful, the company was only liable for compensatory damages. And it is said in the same case that a master is not liable in exemplary damages for the act of his servant, when the plaintiff would not have been entitled to recover such damages had the suit been against the servant. *Townsend v. R. R. Co.*, 56 N. Y., 295. The converse of the latter ruling is not, however, equally true, for the employé of a company, as this court has held, may be liable in exemplary damages, while the company would only be liable for compensatory damages. *R. R. Co. v. Sternes*, 9 Heisk. 52. And the weight of authority seems to be that the company is not to be punished by punitive damages for the mere negligence of the servant, if the company itself be entirely free from blame. *Cleghorn v. R. R. Co.*, 56 N. Y., 44; *Illinois St. R. Co. v. Hammer*, 72 Ill., 353. The company may be put in fault and made liable for exemplary damages, by fixing it with malicious intent, or by showing that it has employed a drunken or otherwise incompetent servant who inflicted the injury, or that its servant, in carrying on the company's business in the due course of his employment, intentionally did the wrong act, or performed a duty in such an improper manner as to show a reckless and wanton disregard of the rights of the aggrieved party. If, therefore, in the case before us, the conductor, after yielding to the request of the plaintiff to put his hand in a designated pocket, merely pretended to do so, or performed the act in so grossly negligent a manner as to indicate a wanton disregard of the rights of the passenger, or to willfully inflict on him an injury, the company would be liable in exemplary damages; the negligence of the plaintiff in that event going only in mitigation of the damages. In any other event, if the company be liable at all, being itself free from fault, the damages would only be compensatory.

This brings us to the point upon which the charge of the trial judge was strongly against the company, and which, no doubt, largely influenced the verdict of the jury, and that is, whether the injuries claimed to have been sustained by the plaintiff by his

night journey from Brentwood to Nashville after his removal from the car, were the proximate result of such removal. Proximate damages, as this court has recently had occasion to say, are the ordinary and natural results of the particular negligence, and therefore such as might have been expected. *Jackson v. Nashville & St. L. R. R. Co.*, 13 Lea. Whether damages are proximate or remote is a question for the jury under proper instructions. And an important element in arriving at a correct conclusion is the conduct of the plaintiff subsequent to the wrong complained of, for it is his duty to see that as little injury follows the act as possible, and if by ordinary care a particular injury may be avoided, he cannot hold the wrong-doer responsible. Thus, where a railroad train failed to stop, as it should have done, at a particular station where the plaintiff was waiting to go on board, and the plaintiff walked home, a distance of several miles, through the cold, whereby he incurred serious sickness, it was held that the act of walking home was as disconnected with the wrong of the company as would have been a loss by robbery. *R. R. Co. v. Birney*, 71 Ill. 391. A company, in giving its servants instructions to put off a passenger at a regular station, and the servant in executing his duty, can scarcely be held liable for a personal injury to the passenger from his own voluntary act of walking home, or to his destination, no matter how distant or how inclement the weather may be, unless, indeed, the jury, in view of all the circumstances, should find that such a course was inevitable, or such as an ordinarily prudent man would resort to, and as the employes of the company, who were immediately instrumental in the wrongful act, from their knowledge of the circumstances, might reasonably have foreseen. The station at which the plaintiff was removed was the most important station between Franklin and Nashville, a small village with a depot building and thirty or forty houses, many of them occupied by persons of the plaintiff's race and color. The injury, if any, occasioned by the walk to Nashville, would not be the proximate result of the removal from the cars at such a station, unless the plaintiff could show that he made reasonable efforts to avoid the walk and consequent exposure by applying for shelter or conveyance, and failed therein. And if the failure of such efforts was due to the negligence of the plaintiff in not having money with him to pay for the accommodations asked for, it would be for the jury to say whether the walk was not the result of such negligence rather than the proximate consequence of removal from the cars.

Some objections were taken by the defendant to the admission of evidence, but as they were made without assigning any reason therefor, they are not sufficient to put the court below in error. *Miller v. State*, 12 Lea, 223.

Exception is also taken to the refusal of the trial court, upon the

request of the defendant below, to require the jury to assess the compensatory and exemplary damages separately. In *Keeth v. Clark*, 4 Lea, 718, the converse of this position was insisted on, and it was assigned as error that the court permitted the jury to return separate findings of fact instead of a general verdict. These are matters intrusted to the discretion of the trial court.

The plaintiff is not precluded of his action by having accepted from the company the fare from Brentwood to Nashville on the morning after his ejection from the cars, and giving a receipt therefor. It does not appear that the transaction was either intended to be or was in fact a settlement of the matters of litigation between the parties.

Judgment reversed and cause remanded for a new trial.

Tennessee Doctrine that Contributory Negligence Goes in Mitigation of Damages.—It is well settled in the State of Tennessee that when the negligence of a railroad company is the proximate cause of an injury, the contributory negligence of the person injured does not bar the action, but may be shown in mitigation of damages. *Smith v. Nashville, etc., R. Co.*, 6 Heisk. 174; *Hill v. Nashville, etc. R. R. Co.*, 9 Heisk. 823; *Railroad v. Welker*, 11 Heisk. 383; *Louisville & Nashville R. R. Co. v. Connor*, 2 Jere Baxt. 303; *N. & C. R. Co. v. Smith*, 6 Jere Baxt. 174; *Nashville & C. R. Co. v. Smith Adm'r*, 15 Am. & Eng. R. R. Cas. 469; *East Tenn., Va. & Ga. R. R. Co. v. Humphrey's Adm'r*, 15 Am. & Eng. R. R. Cas. 472.

Passengers must Exhibit and Deliver up Tickets.—A railroad company has an undoubted right to make rules requiring passengers to exhibit and deliver up their tickets when requested so to do. Passengers are bound to comply with such rules. *State v. Campbell* 32 N. J. L. 309; *Loring v. Abom*, 4 Cush. 608; *People v. Caryl*, 3 Park. Cr. Cas. 326; *Baltimore, etc., R. Co. v. Blocher*, 27 Md. 277; *Hibbard v. New York, etc., R. Co.*, 15 N. Y. 455; *Northern R. Co. v. Page*, 22 Barb. 130; *Ripley v. New Jersey, etc., Trans. Co.*, 31 N. J. L. 388; *Bennett v. Railroad Co.*, 7 Phila. 11; *Illinois, etc., R. Co. v. Whitmore*, 48 Ill. 420; *Downs v. New York, etc., R. Co.*, 36 Conn. 287; *Lane v. East Tenn., Va. & Ga. R. R. Co.*, 2 Am. & Eng. R. R. Cas. 278.

But see *Maples v. New York, etc., R. Co.*, 38 Conn. 557; *State v. Thompson* 20 N. H. 251; *Pittsburgh, etc., R. Co. v. Hennig*, 39 Ind. 509.

Conductor is not Bound to Listen to Passenger's Explanation as to Loss of Ticket.—A conductor is not bound to listen to any explanation on the part of a passenger as to the loss of his ticket. If he fails to produce it, the conductor is clearly justified in expelling him from the train. *Pullman Palace Car Co. v. Reed*, 75 Ill. 125; *Townsend v. New York, etc., R. Co.*, 56 N. Y. 295; *Shelton v. Lake Shore, etc., R. Co.*, 29 Ohio St. 214; *Waver v. Rome, etc., R. Co.*, 3 Y. & C. (N. Y.) 270; *Chicago, etc., R. Co. v. Griffin* 68 Ill. 499; *Jerome v. Smith*, 48 Vt. 230; *Downs v. New Haven, etc., R. Co.*, 36 Conn. 287; *Frederick v. Marquette, etc., R. Co.*, 37 Mich. 342.

Duty of Railroad Company does not Shift with Physical Condition of Passenger.—The duties of a railroad company to its passengers are not ordinarily varied by the passenger's mental or physical condition. The duty of the railroad company, in general, is to be gauged by its duty to the passenger in average mental and physical condition. *Willetts v. Buffalo, etc., R. Co.*, 14 Barb. 585; *Renneker v. South Carolina R. Co.*, 20 S. C. 218; 18 Am. & Eng. R. R. Cas. 149.

Passenger must be Allowed Reasonable Time Before Expulsion to Find Lost Ticket.—A conductor is not justified in expelling a passenger immediately upon his failure to pay fare or produce a ticket. If the passenger asserts that he has purchased a ticket which has been lost, a reasonable time should be given him in which to make search for it. *Maples v. New*

York, etc., R. Co., 38 Conn. 557; Curtis v. Grand Trunk R. R. Co., 12 Upp. Can. C. P. 89; South Carolina R. R. Co. v. Nix, 68 Ga. 572; Louisville & N. R. Co. v. Garrett, 8 Lea (Tenn.), 438; Lake Erie & W. R. Co. v. Fire, 11 Am. & Eng. R. R. Cas. 109; Hayes v. New York Central R. Co., *infra*; Clark v. Wilmington & Weldon R. R. Co., *infra*.

Measure of Damages in Case of Expulsion of Passenger from Train.—Upon the question as to what injuries are and are not considered the proximate results of an expulsion from a train, so as to entitle the party expelled to recover damages therefor, and particularly as to how far a party expelled may recover for injuries occasioned him by walking to his destination, see Cincinnati, H. & S. R. R. Co. v. Eaton and note, *supra*, p. 254.

HAYES

v.

NEW YORK CENTRAL & H. R. R. Co.

(*Advance Case, New York Supreme Court, October, 1884.*)

If a passenger upon a railroad train mislays his ticket, and acting in good faith fails to find it until after the conductor rings the bell for the purpose of stopping the train and ejecting him, in an action against the carrier to recover damages for an unlawful ejection under such circumstances, *held*, that the omission to find and surrender the ticket or pay his fare before the bell rang is not equivalent to a refusal to do so.

Held further, that the passenger is entitled to a reasonable opportunity to find his ticket if he can, and in default to pay his fare, and it is a question of fact for the jury to determine whether or not such reasonable opportunity was allowed.

APPEAL from judgment entered upon a nonsuit directed at Oneida circuit, May, 1884, and from an order denying a motion for a new trial on the merits. The action is brought to recover damages for ejecting plaintiff from the train on its passage from Utica to Rome on the morning of September 11, 1881. At the close of the evidence defendant moved for a nonsuit, which motion was granted and plaintiff excepted.

Oswald Prentiss Backus, for appellant.

D. M. K. Johnson, for respondent.

MERWIN, J.—Concededly the plaintiff had a ticket from Utica to Rome, that he had purchased the afternoon before. As to what occurred just prior to his ejection, there is a conflict of evidence. On the part of plaintiff, there was evidence tending to show that as the conductor came along and asked the plaintiff for his ticket, he tried to find it and could not; told the conductor he had one and would find it in a minute; felt through his pockets, said to the conductor, "You go through the train, and by the time you come back I will find my ticket; if I don't, I have money to pay my fare;" that the conductor said, "Find your ticket or get off the

train;" that the plaintiff said, "Maybe you better put me off this train;" that then the conductor pulled the bell-rope to stop the train; that before it fully stopped the plaintiff found his ticket and offered it to the conductor, who refused to take it and put the plaintiff off.

On the part of the defendant the conductor testified that the plaintiff was in the next to the last car; that as he came along he asked him for his ticket; that the plaintiff found what was apparently a ticket, and the occurrence then proceeded as follows: "I asked him for his ticket; he said he would not give it to me until he got to Rome; I said if you don't give me that ticket, I will have to put you off; he said I wont give it to you; I said very well, I will have to stop the train and put you off; I then rang up the train; the train stopped at once; then I told him to get out; he got up and walked out down on the ground; then he wanted me to take the ticket and I refused; I told him I had stopped the train to put him off, and I wouldn't carry him; I didn't stop that train for any purpose except to have him get off; the rules are, ring up the train and put off a man who don't show his ticket or pay his fare."

The nonsuit was granted apparently upon the theory that, as according to the plaintiff's evidence, the ticket was not produced and tendered before the bell was actually rung, therefore the conductor was justified in putting the plaintiff off.

The counsel for defendant claims that the omission to produce the ticket was equivalent to a refusal, and brings the case within *Hibbard v. N. Y. & E. R. Co.*, 15 N. Y. 455. In that case the plaintiff had a ticket from Hornellsville to Scio; had shown it to the conductor once, and then, afterward and after the train had passed another station, was asked to show it again and refused, and was put off. It was held at circuit that he was not bound to show it again; but the court of appeals held that he was, and that a rule to that effect was reasonable, and reversed the judgment.

In *O'Brien v. N. Y. & C. H. R. R. Co.*, 80 N. Y. 236; s. c. 1 Am. & Eng. R. R. Cas. 259, it is said by Rapallo, J., that if, in consequence of the fractious refusal of a passenger to pay the full fare the company has a right to demand, the train is stopped for the sole purpose of putting him off, he is not entitled to insist on continuing his trip on paying the fare, but may be removed from the train. If, however, the stoppage is at a station, a tender before removal would answer. *Guy v. N. Y., O. & W. R. Co.*, 30 Hun. 399; *Pease v. D. L. & W. R. Co.*, 16 W. Dig. 266.

In *Maples v. N. Y. & N. H. R. Co.*, 38 Conn. 558, the rule is laid down that a passenger whose ticket is mislaid is entitled to a reasonable time to find it.

In *Railroad Co. v. Garrett*, 8 Lea (Tenn.) 438, s. c. 3 Am. & Eng. R. R. Cas. 416, it was held that a passenger who gets upon a

train in good faith, in ignorance of the fact that a tax certificate would not pay his fare, having no intention to impose upon the carrier, cannot be treated as a mere trespasser, but on failure or refusal to pay his fare after request, and after reasonable opportunity allowed to comply, he may be ejected, but if before eviction another person offer to pay the fare, the carrier is bound to receive it and convey the passenger. The offer in that case was after the bell was rung to stop the train. In the present case, if the ticket of the plaintiff was mislaid, and he in good faith was trying to find it, he was entitled to a reasonable time to enable him to do so, if he could, and if, in case of failure to find it after such reasonable opportunity, he was willing and ready to pay his fare, the conductor had no right to put him off. Whether or not the plaintiff was allowed such reasonable opportunity to find his ticket or pay his fare was, upon the evidence on the part of the plaintiff, a question of fact to be determined by the jury. If so, the nonsuit was improperly granted.

A question is made by the appellant that the removal was not at or near any dwelling-house. This is not set up in the complaint, and no point was apparently made about it at the trial. It does not seem important to consider it here.

The judgment should be reversed and nonsuit set aside and new trial granted, costs to abide the event.

Hardin, P. J., and Follett, J., concur.

Tender of Fare in Some Cases is in Time After Expulsion Has Begun.—When the failure of a passenger to pay fare or produce ticket is not morally factious or captious, but arises out of mistake, accident, or the like, it is not too late for him to tender his full fare or his ticket after the train has stopped and the conductor has actually undertaken the expulsion. In such case the conductor is bound to accept the tender, and to allow the passenger to remain on the train. *Garrett v. Louisville & N. R. R. Co.*, 13 Am. & Eng. R. R. Cas. 416; *Louisville, N. & Gt. S. R. Co. v. Harris*, 9 Lea (Tenn.) 180; s. c. 16 Am. & Eng. R. R. Cas. 874; *Guy v. New York, O. & W. R. Co.*, 80 Hun, (N. Y.) 899; *Maples v. New York & N. H. R. Co.*, 88 Conn. 558. And see *Curl v. Chicago, R. I. & P. R. Co.*, 11 Am. & Eng. R. R. Cas. 85; s. c. 16 Am. & Eng. R. R. Cas. 879.

Passenger is Entitled to Reasonable Time to Find Ticket or Procure Fare.—When a passenger fails to present his ticket or pay his fare and endeavors to find or procure same, the conductor is not justified in expelling him immediately, but must give him a reasonable time within which to find his ticket or procure his fare. *South Carolina R. R. Co. v. Nix*, 68 Ga. 572; *Louisville & N. R. Co. v. Garrett*, 8 Lea (Tenn.) 438; *Maples v. New York, etc., R. Co.*, 88 Conn. 557; *Curtis v. Grand Trunk R. Co.*, 12 Upp. Can. C. P. 89; *Lake Erie & W. R. Co. v. Fixe*, 11 Am. & Eng. R. R. Cas. 109; *Louisville & Nashville R. R. Co. v. Fleming*, *supra*; *Clark v. Wilmington & Weldon R. Co.* *infra*.

CLARK

v.

WILMINGTON & WELDON RAILROAD COMPANY.

(Advance Case, South Carolina, 1885.)

In a suit against a railroad company for damages alleged to have resulted from the action of the conductor in ejecting the plaintiff from the train, it appeared that the plaintiff got on the train at a certain station to go to the next station about four miles distant, without a ticket or money to pay his fare. About twenty-five other persons took the same train to go to the same place, one of whom, as it was shown on the trial, promised to pay the plaintiff's fare before they got on the train, but he did not sit in the same car with the plaintiff. In taking up tickets and collecting fare from passengers, the conductor was told by the plaintiff that he had neither money nor ticket, but would get the money if allowed to go into the rear car and see a fellow passenger. The conductor said: "I have not time to wait; you must get off," and thereupon pulled the bell-rope, stopped the train and put the plaintiff off. The train had made about half the distance between the stations. *Held*, that the plaintiff was entitled to recover. The conductor should have allowed him a reasonable opportunity to pay his fare; but an offer to pay (and declined by the conductor) after the train was stopped will not entitle him to return to his seat.

• *Mullen & Moore*, for plaintiff.
Day & Zollicoffer, for defendant.

SMITH, C. J.—The plaintiff, while at Whitaker's station, on the defendant's road, awaiting the arrival of the train on which he intended to take passage for Battleboro', a station four miles distant, and being himself without money, made arrangements with two others, Isaac Powell and T. P. Braswell, who were also going on same train, in which each agreed to pay his fare of twenty-five cents, the charge between those points.

When the train came, all three, with twenty or more others, entered it, the plaintiff taking a seat in the forward coach, Braswell in that next behind, and Powell in that where the plaintiff was, or one next in front. When the conductor was passing through the coaches, taking up the tickets and collecting fares from front to rear of the train, he came to the plaintiff, who said he had neither ticket nor money, but would get the fare if allowed to go to the coach behind, from a gentleman sitting there. The conductor refused to do so, saying: "You must get off; I have not time to wait for you. I have something else to do." The train was then about half-way between the stations, moving at a rapid rate, when the conductor stopped the train, and compelled the plaintiff to get out. Braswell would have advanced the money and paid the fare upon application. As the plaintiff descended from the coach and

was on the lowest step, Powell offered to pay the fare, but the conductor declined to receive it, saying: "You are too late; go and attend to your own business."

In expelling the plaintiff, there was no actual force employed against his person, but the order was given and assistants were present to execute it, and the plaintiff submitted. The action is to recover damages for this ejection of the plaintiff; and the sole question raised by the appeal is, whether under the circumstances the conductor had a right to put the plaintiff off the train. An instruction was requested for the defendant in the charge given to the jury in these words: "When the conductor demanded of the plaintiff his ticket, and he tendered neither ticket nor money, the conductor had the right to eject the plaintiff." This was refused, and in its stead the jury were directed as follows: "The conductor was not bound to go into the other car to get the fare from Braswell, but if Braswell had money, and was ready and willing to pay the fare of the plaintiff, and plaintiff told him, before he stopped the train and started to eject him, that a friend in the next car would pay his fare, then the conductor ought to have allowed plaintiff a reasonable time to get the fare."

The whole controversy is involved in these two instructions, the one refused and the other given. There can be no question of the right of the officer in charge of a train of passenger coaches to remove any one who has entered and refused to pay his fare, or produce his ticket as evidence of its having been paid to some authorized agent of the company, unless he is traveling with its permission without. Such refusal, in opposition to the rules of the company, presents a case which warrants the officer in charge to require such intruder to leave the train, and if necessary to use such force as is sufficient to accomplish his ejection. Nor, when the officer has stopped the train, and he is descending the steps and about to pass out, will a tender of the fare entitle him to return to his seat. He forfeits his right of carriage by such misconduct, by breaking his own contract to pay when called on, and it is not regained by his repentance at the last moment, and after he has caused the inconvenience and delay to the company by his wrongful act. The adjudications fully recognize this authority in the carrier, and it is necessary to prevent imposition upon it. Ang. on Car., Sec. 609, Note A.; Thomp. Carr. Pass. 340, Note 5.

Where there has been no refusal to pay the fare and the obligation not disputed, but for some reason, such as the mislaying of the ticket, or loss of pocket-book in which the money is kept, or other adequate cause which prevents a prompt response to the conductor's demand, it is but reasonable that an opportunity should be allowed the passenger to search for what is mislaid or lost, or to provide other means of payment, where the delay does not interfere with the regular duties of the officer in charge.

The delay in the present case would have been momentary, if, indeed, any had been occasioned, in permitting the plaintiff to precede the conductor in passing into the next coach, and getting the money in time for the call on Braswell, or before Braswell had been reached. Instead of complying with this request made in good faith, the conductor arbitrarily and instantly rang the bell and expelled the plaintiff, producing an interruption in the movement of the train that would have been rendered unnecessary if a brief time had been given to the plaintiff to get the money promised him.

This was a harsh exercise of power, injurious to the plaintiff and needless in the protection of the interests of the company. The cases that uphold the right of the carrier company summarily to expel from its train a passenger who does not produce his ticket or pay when called on, as required by its regulations, are all, so far as we have examined, cases of a denial of the right to demand the fare, or refusal to pay it upon some untenable ground, so that the conductor must submit or enforce his authority against the resisting passenger, and prevent his riding unless he does pay.

The facts of this case do not bring it under the operation of the rule applicable to those who persistently and wrongfully resist the demand of the conductor, acting under directions of his principal and within the sphere of his necessary powers, for the plaintiff acquiesces in the demand of his fare, and merely proposes to pass into an adjoining car to obtain the money promised under a previous arrangement with a fellow passenger. The view of the relations between the passenger and the carrier is sustained by recent decisions. In *Maples v. N. Y. & N. H. R. R. Co.*, 38 Conn. 557, the plaintiff had mislaid his commutation ticket, and could not at the moment, when called on by the conductor, produce it, as he was by the regulations of the company and the conditions of the issue of such ticket required to do, while the conductor knew he had one, and that the time limited therein had not expired. The conductor, regardless of the explanation, and following the letter of his instructions, demanded the fare, and it not being paid, forced the plaintiff to leave the train. For this expulsion the plaintiff sued, and Park, J., delivering the opinion in the supreme court, thus declares the law:

"The plaintiff was entitled to a reasonable time to find it (the ticket). The contract requires him to show his ticket to the conductor, but he was not bound to do so immediately when required. * * * Under such circumstances the plaintiff was entitled to ride as long as there was any reasonable expectation of finding it during the trip." In *Hayes v. N. Y. Central R. R. Co.*, decided in the supreme court at the general term held in October last, reported in *Am. & Eng. R. R. Cas.* vol. 18 p. — *supra*, the plaintiff had a ticket, but failed to find and exhibit it to the conductor when called on,

whereupon the bell was rung, the train stopped, and the plaintiff required to leave. Before the train came to a halt, the plaintiff found his ticket and offered it to the conductor, who nevertheless compelled him to get off. The court say, Merwin J., speaking for all the members: "If the ticket of the plaintiff was mislaid and he in good faith was trying to find it, he was entitled to reasonable time to enable him to do so if he could; and if, in case of failure to find it after such reasonable opportunity, he was willing and ready to pay his fare, the conductor had no right to put him off." See *Railroad v. Garrett*, 8 Lea (Tenn.) 438; s. c. 3 Am. & Eng. R. R. Cas. 416.

It is contended, however, that the short distance to be run over by the train before reaching the station at which the plaintiff was to debark, did not admit of delay and rendered necessary prompt action on the part of the conductor, and it was plaintiff's own fault to enter the coach without a ticket or the means of payment when the fare was required of him. It does not appear in the case that prepayment of fare was necessary, and it is obvious that no appreciable time would have been lost in giving the plaintiff opportunity to call on Braswell and get the money to pay his fare. If this was a mere pretense, and such seems to have been the assumption on which this precipitate action of the officer was taken, a moment would have revealed it, and then the ejection would have been fully warranted.

The defense set up is an assertion of the right to remove from the train any passenger who may not be ready at once to exhibit a ticket or pay his fare, notwithstanding he has the means at hand by passing into an adjoining coach, and only asks time to do so. This rigid rule, enforced, would require every one to have possession of his own ticket or the friend who has it to be near by, at the hazard of expulsion if he did not. In all cases a reasonable indulgence should be shown a passenger in his effort to comply with the rules of the company, and what is reasonable must be determined in connection with the surrounding circumstances and in view of the facts of each case.

We think the plaintiff's request was reasonable, and that the hasty and precipitate action of the conductor was in excess of the authority with which the law armed him. The exceptions to the evidence are not tenable, for its only office was to show that the plaintiff had provided means to pay his fare, and did not intend to trespass upon the rights of the company. In some of the States the right to eject for non-payment is restricted, so far as to require it to be at some station, and not capriciously at any point, which might be at some very inhospitable spot, endangering health if not life.

There is no error, and the judgment must be affirmed.

Passenger Entitled to Reasonable Delay to Procure Fare.—A passenger failing to produce his ticket or pay his fare is entitled to a reasonable delay to find his ticket if lost, or procure his fare from some one else if he has no money. If expelled before he has had such reasonable time, he is entitled to recover damages. *Maples v. New York, etc., R. Co.*, 38 Conn. 557; *Curtis v. Grand Trunk R. Co.*, 12 Upp. Can. (C. P.) 89; *Louisville & Nashville R. Co. v. Garrett*, 8 Lea (Tenn.) 488; *South Carolina R. R. Co. v. Nix*, 65 Ga. 572; *Lake Erie & W. R. Co. v. Fire*, 11 Am. & Eng. R. R. Cas. 109; *Louisville & Nashville R. R. Co. v. Fleming*, *supra*; *Hayes v. New York Central R. Co.*, *supra*.

CARPENTER

v.

WASHINGTON & GEORGETOWN R. R. Co.

(*Advance Case, District of Columbia, April 14, 1884.*)

Plaintiff having received a wrong transfer ticket on changing cars was expelled from the car into which he changed for failing to produce a proper ticket. In an action to recover damages, the court charged that if the mistake was owing to the negligence of the transfer agent, the plaintiff was entitled to damages; that if the wrong transfer ticket was given to him maliciously or wantonly, and he was ejected maliciously and wantonly, he was entitled to vindictive damages; and further, that if the conduct of defendant was wanton, the negligence of plaintiff would be no defence. *Held*, that the instructions were all that the plaintiff could ask.

Where the instructions of the court in its charge to the jury states the law fully and properly, it is not cause for reversal that the points of either side have been declined.

THE case is stated in the opinion.

B. J. Darnielle and *John E. Latimer*, for plaintiff.

Enoch Totten, for defendant.

Cox, J.—The case of James N. Carpenter against the Washington & Georgetown Railroad Co. is an action for trespass by ejecting the plaintiff from the cars of the defendant. The case made by the plaintiff in his evidence was, that he entered one of the cars of the company on Seventh street, going south towards Pennsylvania avenue, and at the junction of Seventh street and the avenue he applied for a transfer ticket for the purpose of going down the avenue towards the Capitol. When he entered the avenue car, or shortly afterwards, he discovered that his ticket was a ticket for the Seventh street track, which he had just left, and upon presenting it to the conductor, the latter refused to acknowledge it, and required him to pay an additional fare, and upon his refusal to do so, he was violently forced out of the car. That is the trespass complained of.

For the defendant, the proof tended to show that the plaintiff, instead of getting off the Seventh street car, approached the agent

from the rear of an avenue car going west, together with other passengers manifestly leaving that car, and that they were receiving transfer tickets from him, and he supposed this plaintiff to be one of that company, and delivered this transfer ticket to go on the Seventh street car to him as he did to the others, and the plaintiff took it without objection, and therefore it was the plaintiff's own negligence that led to this result.

The only question before us relates to certain instructions that were asked and refused. At the trial, several instructions were granted at the instance of the plaintiff, and then the following were refused:

"That if the jury shall believe from the evidence that the plaintiff paid his fare on the Seventh street car, and, on arriving at Pennsylvania avenue, the Pennsylvania avenue car of the defendant was then stopping at the crossing of the two lines (Pennsylvania avenue and Seventh street), and plaintiff immediately on arriving at Pennsylvania avenue went to the transfer ticket agent of said defendant there stationed, and asked for and received a transfer ticket, and that then and there the transfer ticket agent gave him a transfer ticket; that thereupon the plaintiff went immediately with said transfer ticket on board the said Pennsylvania avenue car, and, after the car started, offered it when called on in the usual way to the conductor, who refused to receive it, but together with the driver of the car forcibly put plaintiff off the car, then they shall find for the plaintiff, even if they should also find that the transfer ticket agent had given plaintiff a wrong ticket, either intentionally or by mistake."

And again:

"That if the jury shall believe from the evidence that the ejection of the plaintiff from the Pennsylvania avenue car resulted from the slightest neglect or misconduct of the transfer ticket agent, or the conductor of the Pennsylvania avenue car, then they shall find for the plaintiff."

And again:

"That if the injury complained of could have been prevented by the exercise of ordinary care by defendant, the defendant is liable even if the plaintiff was at fault."

And again:

"That if the jury shall believe from the evidence that the conduct of the defendant was wanton, then the negligence of plaintiff, even if proved, would be no defence."

These several instructions were refused in the form in which they were applied for, and an exception taken to each refusal. But in the final charge which the court gave to the jury, they were instructed as follows:

"That if they believed from the evidence that the agents of the defendant had made a mistake in giving to the plaintiff a transfer ticket, and, instead of giving him a Pennsylvania avenue transfer,

had given him a Seventh street transfer, the plaintiff was entitled to recover, and that, in assessing the damages, the plaintiff was entitled to have reasonable damages, compensatory for the treatment which he had received, and that the defendant company was bound to see to it that the plaintiff was provided with a proper transfer, and that if the mistake had been made, the responsibility therefor rested upon the company and not upon the plaintiff.

"And the court further instructed the jury that if, upon the other hand, they believed that the conduct of the agents of the company was wanton and malicious, and that they had purposely given him the wrong transfer, and that they had maliciously and wantonly ejected him from the car because of a personal dislike or animosity, that then the plaintiff was entitled to recover, and in assessing damages in that view of the case, the plaintiff was entitled to recover not only compensatory but vindictive damages."

We are of opinion that the instruction given in the charge covered all the ground claimed by the plaintiff himself, and was all the instruction he was entitled to ask, and I believe that was virtually conceded by the counsel in argument.

But it is claimed on the part of the plaintiff that the court is not to look at the charge given by the court below, but only at the instructions that were proposed, refused and excepted to.

It is perfectly true that we do not revise for the purpose of correcting, as error, anything that is not excepted to below. But we are not looking at it in that view, but only to ascertain whether, on the whole, the instruction given by the court below was correct. It was the practice of the late chief justice Taney, in his circuit, always to refuse all instructions prayed for by either party, and then to give the law in his own words. That is also the practice of other courts, and we consider it to be in the discretion of the court to reject all prayers and state the law in its own language. That was the practice pursued in this case to some extent. Some of the prayers of the plaintiff were granted, but the substance of those that were refused was given in this charge. It is a very common thing to except to a part of the charge, but the court must look at the whole charge, and if they see that, in the very next paragraph, an apparent error in one part is corrected, then no injury on the whole is done to the plaintiff, or defendant, as the case may be. We consider it to be perfectly proper for the court to announce the law in its own language, and if it gives the law correctly, although it may have refused the instructions, asserting it in another shape than that asked by the counsel, there is nothing that can justify us in reversing the judgment and ordering a new trial, and that is precisely this case.

On the whole, we think the court instructed the jury very liberally, if not too liberally, in favor of the plaintiff, and we see no ground, therefore, for reversing the judgment below, which was for the defendant.

PHILADELPHIA, WILMINGTON & BALTIMORE R. R. Co.

v.

HOEFLICH.

(Advance Case, Maryland, 1884.)

A young woman was seated in a train, in the same seat with her sister, a girl of eleven years. The father of both of these parties was on the train, but seated elsewhere. Upon the conductor asking the young woman for tickets, she produced two, one for herself and one for her father. She had, however, no ticket for the little girl, and refused to pay any fare for her, though several times requested to do so. She admitted, in answer to the conductor's questions, that the little girl was with her. At the next station the conductor ejected both the young woman and the girl. It appeared in evidence that he knew there was a man accompanying them on the train, viz., the father, but did not know of his relationship to them. The father interfered to endeavor to prevent the expulsion, and himself got off the train with the expelled parties. In an action against the company by the young woman for expelling her,

Held, that if the jury was of opinion that the conductor could reasonably infer from the circumstances that the plaintiff's younger sister was under her charge, and that therefore she was responsible for the younger sister's presence in the car and for her fare, the conductor was justified in expelling her as well as her younger sister.

Held, however, that as the father of the child was the party really responsible for the child's presence and fare, it was for the jury to say whether it was not the conductor's duty, under the circumstances, knowing there was a man in the party, to ascertain the relationship of that man to the child, and in case the jury found that such was his duty and that he failed to perform it, he was not justified in expelling the plaintiff, and the company was liable accordingly.

The fact that the expulsion in the above case was forcible and deliberate, did not entitle the plaintiff to recover damages unless the conductor acted with malice, oppression or evil intent.

The opinion states the facts.

J. J. Donaldson, for plaintiff in error.

W. A. Hammond and *Charles Brandano*, for defendant in error.

The female plaintiff, with her father and younger sister, eleven years of age, got upon the defendant's train at Baltimore for the purpose of going to Magnolia station. When the conductor came around she handed him two tickets, one for herself and the other for her father, who was in another part of the car. The younger sister was sitting beside her, and the conductor asked, "Is this girl with you?" She answered, "Yes." Thereupon he said he must collect half fare for the girl, which the plaintiff refused to pay. In a few minutes the conductor returned and again demanded payment of the child's fare, and which was again refused by the

plaintiff. After making a demand a third time, he told her unless the fare was paid, he should be obliged to put her and the child off at Chase's station, and the plaintiff still refusing to pay the same, she and the child were both put off the train. The plaintiff had paid her own fare, and the defendant had no right, of course, to eject her from the train, unless there was a contract express or implied on her part to pay the fare of her younger sister. There is no evidence of an express contract, and if one is to be implied, it must be on the ground that the younger sister was under her charge, and being under her charge, and thus responsible for her presence in the car, it was her duty to see that the fare was paid. The defendant was under no obligation, of course, to carry the younger sister without being paid a reasonable compensation, and if she was under the plaintiff's charge, it is but fair and reasonable to hold her responsible for the fare. Under such circumstances, the law would imply an agreement on her part to pay the fare of the child, and if she refused to pay it, the defendant had the right to put off both the plaintiff and the child—the plaintiff, because she had not complied with the contract on her part implied by law; and the child, because the company was not required to carry it unless its fare was paid according to the rules and regulations of the company.

But it seems the father of the child was, in fact, in the car, and if so, he was, as the natural guardian and protector of his child, liable for the payment of its fare. And although the conductor found the child sitting beside the plaintiff, yet if he knew the father was in the car, or the circumstances were such as to put a reasonable person on inquiry, he had no right to hold the female plaintiff responsible for her sister's fare, and this, we think, was a question for the jury. Now he did inquire, it is true, whether "the girl sitting beside the plaintiff was with her," to which she replied "Yes;" and if the case rested here, it might be said that he was justified in acting on the presumption that the girl was under the plaintiff's charge.

But the plaintiff says she told him her father was in the car, and although this is denied by him, the proof shows beyond question that he knew there was a man traveling in company with the plaintiff and her sister, and that he interfered for their protection when they were being put off, and further, that he went off with them. So, whether the conductor knew or might have reasonably known by proper inquiry that this man was their father, was under all the circumstances a proper question to be submitted to the jury. If he did know it, or the circumstances were such as to put him on the inquiry, he had no right, of course, to eject the plaintiff from the train, and there was no error in granting the plaintiff's first prayer. For the same reasons the defendant's prayers were properly refused. All the facts set forth in these prayers, namely,

that the younger sister was sitting beside the plaintiff, that the latter, in reply to the inquiry of the conductor, "Is this girl with you?" said, "Yes," that he thereupon demanded of her the payment of half fare for the girl, which she refused to pay, that she did not tell him the child's father was in the car, nor refer him to the father for the fare of the child—all these facts might be found by the jury, and yet, when considered in connection with other facts, it would not necessarily follow that the conductor was justified in assuming that the child was under the plaintiff's charge, and that she was therefore liable for the payment of its fare. Although the plaintiff may not have told him that the child's father was in the car, and that he was the proper person to pay its fare, yet he knew there was a man in company with the female plaintiff and her sister, and the question comes up whether under the circumstances it was not his duty, before resorting to the extreme measure of ejecting a woman and child, to have inquired what relation this man bore to them. This question is by the defendant's prayers excluded from the jury.

Nor can these prayers be supported on the ground that the facts thus relied on estop the plaintiff from maintaining this suit. She ought, no doubt, to have referred the conductor to the father for the payment of the child's fare. But she was a passenger, and as such had a right to stand on her own rights, and the conductor was acting on his own responsibility. Her conduct cannot fairly be said to amount to bad faith such as would estop her from bringing this suit. In reply to the conductor's inquiry, she said the child was with her, but not necessarily in the sense that the child was under her charge and protection. Besides, the conductor knew there was a man in company with them, and although she did not tell him that he was the girl's father, yet this he could have learned by proper inquiry.

We come now to the only question about which we think there can be any difficulty in this appeal, and that is the question in regard to the rule of damages laid down by the court. If the plaintiff was wrongfully ejected from the train, she was unquestionably entitled to recover such damages as the jury might think, under all the circumstances, a proper compensation for the unlawful invasion of her rights as a passenger, and the injury to her person and feelings. To so much of the plaintiff's prayer there can be no objection. But in addition to such damages as these, the court instructed the jury, if the plaintiff was forcibly and deliberately ejected, they might give such exemplary damages as they might think a proper punishment for the conduct of the defendant. The force or deliberation with which the wrongful act is done is not necessarily the test by which the question of punitive damages is to be determined. On the contrary, to entitle one to such damages, there must be an element of fraud, or

malice, or evil intent, or oppression, entering into and forming part of the wrongful act. It is in such cases as these that exemplary punitive damages are awarded as a punishment for the evil motive or intent with which the act is done, and as an example or warning to others. But where the act, although wrongful in itself, is committed in the honest assertion of a supposed right, or in the discharge of duty, or without any evil or bad intention, there is no ground on which such damages can be awarded.

In the *Phila., Wilmington, etc., Railroad Co. v. Quimby*, 21 Hav. 202, Mr. Justice Campbell says: "Whenever the injury complained of has been inflicted maliciously or wantonly, and with circumstances of contempt or indignity, the jury are not limited to the ascertainment of simple compensation for the wrong committed against the aggrieved person. But the malice spoken of in this rule is not merely the doing of an unlawful act. The word implies that the act complained of was conceived in the spirit of mischief, or of criminal indifference to civil obligations."

And in the still later case, in the same court, of *Milwaukee v. Arnies*, 1 Otto, 489, Mr. Justice Davis said: "Redress commensurate to such injuries should be afforded. In ascertaining its extent, the jury may consider all the facts which relate to the wrongful act of the defendant and its consequences to the plaintiff, but they are not at liberty to go further unless it was done wilfully, or was the result of that reckless indifference to the rights of others which is equivalent to an intentional violation of them. * * * The tort is aggravated by the evil motive, and on this rests the rule of exemplary damages."

We might multiply the cases on this subject if necessary, all concurring that exemplary damages are awarded as a punishment for the evil motive or intention with which the unlawful act is done, and as a warning or example to others. The mere fact that one is forcibly and deliberately ejected from a railroad car does not necessarily imply that it was done wantonly, or wilfully, or with a bad motive, although the act may be in itself unlawful. Conceding, then, that the female plaintiff was wrongfully ejected from the car, the fact that it was forcibly and deliberately done are not the tests by which the plaintiff's right to recover the punitive damages is to be determined. On the contrary, before resorting to so extreme a measure, it was but proper that the conductor should have acted deliberately and not hastily or inconsiderately; and if the plaintiff refused to leave the car on being requested to do so, the use of force became absolutely necessary, the only question being whether the force thus used was excessive.

The case of the *Baltimore & Yorktown Turnpike Co. v. Boone*, 45 Md. 344, on which the instruction of the court is based, differs widely from the one now before us. There the company, in violation of its charter, had exacted illegal and excessive fares, and

passengers were compelled to pay the same or subject themselves to be expelled from the cars. It was under these circumstances, the court held, that public policy required the corporation should be liable to the highest measure of damages for the deliberation and force accompanying its illegal conduct. But there are no considerations of public policy that require the application of such a rule in a case like the one now under consideration. On the contrary, to entitle the plaintiff to recover punitive damages, according to all the decisions, both in this country and in England, the jury must find that the wrongful act was done wantonly or wilfully, or in the spirit of oppression. It is the evil motive or intention with which the wrongful act is done, say the supreme court, on which rests the rule of punitive damages.

The court was wrong, therefore, in instructing the jury that the plaintiffs were entitled to punitive damages, if they should find the wrongful act complained of was deliberately and forcibly done.

Judgment reversed and new trial awarded.

ANDERSON *et al.*

v.

WABASH, ST. L. & P. RY. CO.

(*Advance Case, Iowa, December 3, 1884.*)

Where a chest containing property belonging to two passengers on a train, to whom a check was issued jointly, is lost, in an action to recover for its value the refusal of the court to instruct the jury that, as the evidence showed that some of the articles were owned in severalty, no recovery could be had therefor, is not error when the evidence was admitted without objection, and no motion was made to sever the causes of action.

APPEAL from Wapello Circuit Court.

This is an action at law by which the plaintiffs seek to recover of the defendant the value of certain baggage alleged to have been lost by the defendant in June, 1881. There was a trial by jury, and a verdict and judgment for the plaintiff of \$85. Defendant appeals.

Trimble, Carruthers & Trimble, for appellant.

John B. Ennis, for appellees.

ROTHROCK, C. J.—It appears from the evidence that the plaintiffs are natives of Sweden; that they came from that country to the United States at the same time, and as traveling companions. Before leaving Sweden, they procured a large chest, made of boards, for their joint use, and in which they placed their wearing

apparel. They purchased through tickets from some point in Sweden to Ottumwa, Iowa, by way of Montreal, Detroit and Toledo, Ohio. The chest was not checked through to the point of plaintiffs' destination, but it was re-checked at Detroit, and also at Toledo. It did not arrive at Ottumwa, but another piece of baggage arrived there with a check upon it corresponding with the check delivered to the plaintiffs at Toledo. Charles Anderson, one of the plaintiffs, testified to the contents of the chest, and to the value thereof. He described several articles of clothing as belonging to him, and several other articles as belonging to his co-plaintiff. He designated the plaintiff A. Anderson as his partner. No objection was made to this evidence, but the defendant asked the court to instruct the jury that the plaintiffs were not entitled to recover for any of the property not jointly owned by them, and that, as the evidence showed that some of the articles were owned by the plaintiffs in severalty, no recovery could be had therefor. The court refused to give this instruction, upon the ground that the objection came too late, the evidence of ownership having been admitted without objection, and no motion was made to sever the causes of action.

This ruling of the court is, as it appears to us, the principal question in the case, and our examination of the record has led us to the conclusion that the court was correct in refusing to give the instruction. The plaintiffs were the joint owners of the chest, and the check was issued to them jointly, and a check for baggage answers the purpose of a bill of lading. It is evidence of the contract between the carrier and the traveler for the transportation of his baggage, and this suit was brought on that contract. It is not disputed that a joint recovery may be had for the chest, because it appears that it was the joint property of the plaintiffs, and the check was issued to the plaintiffs jointly, not only for the safe carriage and delivery of the chest, but for the contents as well; and the fact that as between the plaintiffs the contents were in fact owned by one and in part by the other cannot affect the joint contract made by the defendant. It entered into a joint contract, and it cannot be allowed to insist that the contract shall be severed and separate actions brought thereon. If the theory of the defendant be correct, the plaintiffs must be required to institute three actions, one by both of them for the loss of the chest, and one by each of them for the loss of his own clothing. The law requires no such multiplicity of actions upon such a contract as this. We think the objection of the defendant should have been overruled, if made at the time the evidence was introduced; and it will be remembered that we place our ruling upon the ground that the defendant contracted with both the plaintiffs jointly for the benefit of each that it would carry the chest and contents and deliver it to them at Ottumwa, and we think the rule we announce is within Section 2,544 of the Code.

It is insisted that the evidence does not show that the chest came into the possession of the defendant at Toledo. It appears that, when the plaintiffs arrived at Toledo, they exchanged the check they then had for another, and left the agents of the defendant to place the duplicate, or the check corresponding with that delivered to the plaintiffs, upon the chest. The baggage must have arrived at Toledo, because one of the plaintiffs assisted in loading it on the train at Detroit, where it was checked for Toledo. But it is useless to discuss the evidence upon this point: It is enough to say that there is no such failure of proof as to authorize us to interfere with the verdict.

There are other questions of minor importance, pertaining to the rulings of the court upon the admission and exclusion of evidence, which we do not deem it necessary to refer to in detail. None of them appear to be well taken, and the disposition which we make of the case renders it unnecessary to pass upon the motion of appellees to dismiss the appeal as to one of the plaintiffs.

Affirmed.

Reed, J., dissenting.

HEENRICH

v.

PULLMAN PALACE CAR CO.

(*Advance Case, U. S. District Court, D. Oregon, 1884.*)

A master is liable for the act of his servant when done within the scope or general course of his employment, although done contrary to the master's orders.

An answer to a complaint by a passenger against a common carrier for injuries caused by the negligent discharge of a pistol by the car porter, which alleges merely that the porter received the pistol from another passenger, in violation of the company's rules and directions to receive no package, baggage, or article of luggage from passengers, is demurrable.

Action for injury to the person.

Julius Moreland, for plaintiff.

Charles B. Bellinger, for defendant.

DEADY, J.—This action is brought by the plaintiff, a citizen of Minnesota, against the defendant, a corporation formed under the laws of Illinois, to recover \$25,000 damages for an injury to her person, received while traveling as a passenger on a Pullman palace car attached to a train on the Northern Pacific Railway, running from St. Paul to Portland, and caused, as alleged, by the negligent handling of a pistol by the porter in charge of said car while "in the discharge of his duty as such porter," and "while

attending to the defendant's business," whereby the same fell on the car floor and was discharged, the ball entering the thigh of the plaintiff, and inflicting a dangerous wound therein. The answer of the defendant controverts the allegation of the plaintiff that the porter "was in the discharge of his duty" when he let the pistol fall; and also contains a plea in bar of the action—that the pistol mentioned in the complaint was the property of a passenger on said train; that said porter received it from the owner, and was carrying it through the car at the request of said owner, and not otherwise, at the time of the discharge and wounding in the complaint mentioned; and that it is one of the defendant's rules and directions to all its car porters that they are not permitted to receive any package, baggage, or article of luggage from passengers, or to become custodians thereof, which rule and order was, at the time of the taking and carrying of said pistol by said porter, well known to him; and that said porter, in so receiving and carrying said pistol, was acting in violation of defendant's orders. To this new matter the plaintiff demurs, for that it does not constitute a defence to the action.

A corporation is liable to the same extent as a natural person for an injury caused by its servant in the course of his employment. *Moore v. Fitchburg, Ry. Corp.*, 4 Gray, 465; *Thayer v. Boston*, 19 Pick. 511.

In Story, Ag. Sec. 452, it is laid down that a principal is liable to third persons in a civil suit for the frauds, deceits, concealments, misrepresentations, torts, negligences and other malfeasances or misfeasances and omissions, although the principal did not authorize or justify, or participate in, or, indeed, know of such misconduct, or even if he forbade the acts or disapproved of them. In all such cases the rule applies *respondeat superior*, and it is founded on public policy and convenience; for in no other way could there be any safety to third persons in their dealings, either directly with the principal, or indirectly with him through the instrumentality of agents. In every such case the principal holds out his agent as competent and fit to be trusted, and thereby, in effect, he warrants his fidelity and good conduct in all matters within the scope of his agency.

In *Ramsden v. Boston, & A. R. Co.*, 104 Mass. 117, it was held that the corporation was liable to an action for an assault and battery, for the act of its conductor in wrongfully and unlawfully attempting to seize the parasol of a passenger for her fare. In delivering the opinion of the court, Mr. Justice Gray said:

"If the act of the servant is within the general scope of his employment, the master is equally liable, whether the act is willful or merely negligent, or even if it is contrary to an express order of the master."

In *Philadelphia & R. Ry. Co. v. Derby*, 14 How. 468, a servant

of the corporation ran an engine on its track contrary to its express order, and thereby caused a collision, in which the defendant was injured, and it was held that the corporation was liable for the injury. In delivering the opinion of the court, Mr. Justice Grier said :

“ The rule of *respondeat superior*, or that the master shall be civilly liable for the tortious acts of his servant, is of universal application, whether the act be one of omission or commission, whether negligent, fraudulent or deceitful. If it be done in the course of his employment, the master is liable ; and it makes no difference that the master did not authorize or even know of the servant's act or neglect ; or even if he disapproved or forbade it, he is equally liable, if the act be done in the course of his servant's employment.”

The authorities to this point might be multiplied indefinitely, but these are sufficient. Tried by them, this defence is clearly bad. It is not alleged that the corporation commanded the porter to do the act which caused the injury to the plaintiff, and therefore, if it was not done in the course of his employment, it is not liable therefor. But if the act was done in the course of his employment, the corporation is liable to the plaintiff for the injury caused thereby, notwithstanding the order to the porter. The case, so far as appears, must turn on the issue made by the denial of the allegation that the porter was in the discharge of his duty, or the course of his employment, at the time he let the pistol fall. And whether he was acting contrary to his employers' orders or not, is altogether immaterial.

In Whart. Neg. Sec 157, in discussing this subject the learned author says :

“ That he who puts in operation an agency which he controls, while he receives its emoluments, is responsible for the injuries it incidentally inflicts. Servants are, in this sense, machinery, and for the defects of his servants, *within the scope of their employment*, the master is as much liable as for the defects of his machines.”

And Cooley; Torts, 539, says :

“ It is immaterial to the master's responsibility that the servant, at the time, was neglecting some rule of caution which the master had prescribed, or was exceeding his master's instructions, or was disregarding them in some particular, and that the injury which actually resulted is attributable to the servant's failure to observe the directions given him. In other words, it is not sufficient for the master to give proper directions ; he must also see that they are obeyed.”

On page 540 the learned author gives an apt illustration of the rule. A farm servant burned over the fallow when the wind was from the west, and thereby destroyed the adjoining premises on

the east, although he had been directed, on that very account, not to set out the fire unless the wind was in the west, and the master was responsible.

The cases cited by counsel are not in conflict with this conclusion. They are Whart. Neg. Sec. 168; *Tuller v. Voght*, 13 Ill. 285; *Oxford v. Peter*, 28 Ill. 435; *Foster v. Essex Bank*, 17 Mass. 508; and *Mali v. Lord*, 39 N. Y. 381. They are only to the effect, as is said in *Oxford v. Peter*, that the master is not liable "for the willful or malicious acts of his servant, unless it is in furtherance of the business of the master." The contention in these cases was not as to the rule of law, but the application of it,—whether the act complained of was done in the furtherance of the business of the master, or, rather, in the course of the servant's employment. Sometimes this is a very nice question, and difficult to determine, but the rule of law is, I think, undisputed, that where the servant is acting in the course of or within the scope of his employment, the master is liable for his acts of commission or omission, as if they were his own; and this, notwithstanding the servant may have acted contrary to his master's orders. Whether the act complained of in this case was within the scope of the porter's employment on that occasion, will be ascertained from the evidence on the trial of the issue elsewhere made in the case.

The demurrer is sustained.

Company Liable for Assaults of Servants upon Passengers Whether Within Scope of Employment or Not.—In many cases a railroad company has been held liable for violent or malicious assaults by servants upon passengers, independent of the question whether or not the servant was at the time acting within the scope of his employment. This is upon the ground that the company is bound to protect its passengers from such assaults as part of the contract of carriage. *Craker v. Chicago & M. R. Co.*, 36 Wisc. 657; *Pittsburgh, etc., R. Co. v. Hinds*, 53 Pa. St. 212; *Weed v. Panama R. Co.*, 17 N. Y. 362; *Milwaukee, etc., R. Co. v. Finney*, 10 Wisc. 388; *Chamberlin v. Chandler*, 3 Mason, 242; *Nieto v. Clark*, 1 Cliff. 145; *Quigley v. Central Pacific R. Co.*, 11 Nev. 350; *Sherley v. Billings*, 8 Bush, 147; *Maleeck v. Tower Grove, etc., R. Co.*, 57 Mo. 18; *Goddard v. Grand Trunk R. Co.*, 57 Me. 202; *Hanson v. European, etc., R. Co.*, 62 Me. 84; *Pendleton v. Kingsley*, 3 Cliff. 416; *Bryant v. Rich*, 106 Mass. 189; *Rounds v. Delaware, etc., R. Co.*, 64 N. Y. 129; *Shea v. Sixth avenue R. Co.*, 62 N. Y. 180; *Cohen v. Dry Dock, etc., R. Co.*, 69 N. Y. 170; *Stewart v. Brooklyn & C. R. Co.*, 90 N. Y. 588; *Ramsden v. Boston, etc., R. Co.*, 104 Mass. 117; *Terre Haute v. Indianapolis R. R. Co.*, 6 Am. & Eng. R. R. Cas. 178; *Chicago & E. R. Co. v. Flexman*, 8 Am. & Eng. R. R. Cas. 354; *Wabash, etc., R. Co. v. Rector*, 9 Am. & Eng. R. R. Cas. 264; *Lynch v. Metropolitan Elevated R. Co.*, 12 Am. & Eng. R. R. Cas. 119; *Stewart v. Brooklyn, etc., R. Co.*, 12 Am. & Eng. R. R. Cas. 127; *Louisville & Nashville R. R. Co. v. Kelly*, 13 Am. & Eng. R. R. Cas. 1; *Bryan v. Chicago, R. I. & P. R. Co.*, 16 Am. & Eng. R. R. Cas. 335; *International & Great Northern R. Co. v. Kentle*, 16 Am. & Eng. R. R. Cas. 337.

Company not Liable for Assaults of Servants upon Passengers Outside Scope of Employment.—In other cases the company has not been held liable unless the servant making the assault appears to have been acting within the scope of his authority. *Isaacs v. Third avenue R. R. Co.*, 47 N. Y. 122; *Parker v. Erie R. Co.*, 5 Hun, 57; *McKean v. Citizens' R. Co.*, 42 Mo.

88; *Little Miami, etc., R. Co. v. Wetmore*, 19 Ohio St. 110; *Ward v. General Omnibus Co.*, 42 L. J. (C. P.) 265; *Johnson v. Chicago, R. I. & P. R. Co.*, 8 Am. & Eng. R. R. Cas. 206. The cases are, however, opposed to the current of modern authority.

Company liable for Assaults of Servants upon Passengers Within Scope of their Employment.—It is unquestionably admitted by all the authorities that where the servant is acting within the scope of his employment, the company is liable for the assault, although the same is of course committed without instruction of the company. *Hewett v. Swift*, 8 Allen, 420; *McKinley v. Chicago, etc., R. Co.*, 44 Iowa, 314; *Atlantic, etc., R. Co. v. Dunn*, 19 Ohio St. 162; *Passenger R. Co. v. Young*, 21 Ohio St. 518; *Indianapolis, etc., R. Co. v. Anthony*, 43 Ind. 183; *Jeffersonville, etc., R. Co. v. Rogers*, 38 Ind. 116; *New Orleans, etc., R. Co. v. Hurst*, 86 Miss. 660; *Pittsburgh, etc., R. Co. v. Theobald*, 51 Ind. 246; *Quigley v. Central Pac. R. Co.*, 11 Nev. 350; *Travers v. Kansas, etc., R. Co.*, 68 Mo. 421; *Baltimore, etc., R. Co. v. Blacher*, 27 Md. 277; *Brown v. Hannibal & St. Joe. R. Co.*, 66 Mo. 588; *Northwestern R. Co. v. Hack*, 66 Ill. 238; *Galveston, etc., R. Co. v. Donahoe*, 9 Am. & Eng. R. R. Cas. 287.

Principal Case Considered—Analogous Case.—The question raised in the principal case is, it will be observed, somewhat different from those above referred to. The act complained of upon the part of the servant was merely negligent, and not a willful or malicious assault. In such case it seems that the company is not liable unless the negligent act complained of was committed in the course of the servant's employment. The only case in the books at all analogous is that of *McClenaghan v. Brock*, 5 Rich, L. (S. C.) 17. Here the owner of a steamboat, carrying a slave as a passenger, was held not liable to the slave's master for an injury to the slave occasioned by the negligent discharge of a gun in the hands of a free negro employed as assistant engineer upon the steamboat, the free negro and slave being both, at the time of the shooting, in a lighter alongside of the boat, and the former not being engaged in pursuing his employment.

COMMONWEALTH OF MASSACHUSETTS

v.

KENNEDY.

(136 *Massachusetts Reports*, 152.)

At the trial of an indictment for an assault upon an officer while in the lawful execution of the duties of his office, there was evidence tending to show that the defendant, while in an intoxicated condition, entered a passenger car of a railroad corporation, standing upon a track at a station; that while in the car, he engaged in a scuffle with another person in a similar condition; that he was requested by the conductor in charge of the car to leave the car, and, upon his refusal to comply, was ejected by the conductor and a brakeman, but immediately entered the car again, and refused to leave at the request of the conductor; that thereupon an officer came into the car and found the defendant standing in the car, drunk and staggering about, and cursing and talking in a drunken manner; that the conductor requested the officer to eject him; that the officer told him to go out and he refused; that the officer then told him that if he did not go out he would arrest him; that the defendant again refused, and the officer arrested him; and that the defendant resisted and struck the officer. *Held*, that upon this evidence the jury might infer that the arrest was for being drunk, and that the defendant knew that it was for that cause.

At the trial of an indictment for an assault upon an officer while attempting to arrest the defendant, who, being intoxicated, was conducting himself in a disorderly manner in a passenger car of a railroad corporation, the officer testified that he was sent for to go into the car. On cross-examination, he was asked whether he was employed by the railroad company to preserve order, or for any purpose; to which he replied, that he was not regularly in its employ for any purpose. On re-direct examination, he was asked who requested him to go into the car. This question was objected to by the defendant, but the judge admitted it; and the witness stated that it was the station-master of the railroad. *Held*, that the defendant had no ground of exception.

Two indictments, charging the defendants, on December 25, 1882, at Attleborough, with an assault upon Elisha C. Brown, a deputy sheriff, while in the due and lawful execution of the duties of his office.

There was evidence tending to show that Kennedy, Jr., while in an intoxicated condition, entered a passenger car of the Boston & Providence Railroad Company standing upon a side track at the passenger station in North Attleborough; that, while in the car, he engaged in a scuffle with another person in a similar condition; that he was requested by the conductor in charge of the car to leave the car, and upon his refusal to comply, was ejected by the conductor and a brakeman, but immediately entered the car again and refused to leave at the request of the conductor; that thereupon Elisha C. Brown, a deputy sheriff, came into the car and found Kennedy, Jr., standing in the car, drunk and staggering about, and cursing and talking in a drunken manner; that the conductor requested Brown to eject him; that Brown thereupon told Kennedy, Jr., to go out, and he refused; that Brown then told him that if he did not go out, he would arrest him; that Kennedy, Jr., again refused, and Brown arrested him; that the defendant resisted and struck the officer, and thereupon Kennedy, Sr., came up and struck the officer during the struggle. This evidence was contradicted by the defendants and their witnesses. Brown thereupon arrested Kennedy, Sr., too, and locked them both up, and made complaint against both the next morning for drunkenness and for assault upon him while in the execution of the duties of his office. They were convicted upon the charge of drunkenness, and appealed, and were bound over to the superior court upon the charge of assault. The two appeals for drunkenness were tried with these indictments. Kennedy, Jr., was convicted, and Kennedy, Sr., was acquitted upon the appeals. There was no other evidence of the cause of the arrest.

Brown testified, upon direct examination, that he was sent for to come from his office to the railroad station and go into the car. On cross-examination, he was asked whether he was employed by the railroad company to preserve order, or for any purpose, to which he replied, that he was not regularly in its employ for any purpose. On re-direct examination, he was asked who requested

him to go into the car. This question was objected to by the defendant, but the judge admitted it; and the witness stated that it was the station-master of the railroad, who telephoned him to come.

The defendants asked the judge to rule that there was no evidence that either of the defendants knew that the officer was making the arrest for drunkenness, and that there was no evidence that he did arrest or attempt to arrest either of them for that cause. The judge refused so to rule, but instructed the jury that the failure of Kennedy, Jr., to go out of the car on request was not a legal cause for arrest for any breach of the peace which occurred before the officer arrived; but that any breach of the peace committed in the presence of the officer was a legal cause for arrest, and forcible resistance by Kennedy, Jr., to his removal by any person authorized to eject him, and using only reasonable force therefor, would be a breach of the peace; that drunkenness in a public place was a legal cause for arrest by any officer then present; that if the officer gave to Kennedy, Jr., a false cause for his arrest, which was insufficient in law to authorize such arrest, then said Kennedy, Jr., was justified in resisting the same with reasonable force, and Kennedy, Sr., in assisting in such resistance, though the officer had an undisclosed cause for arrest sufficient in law to have justified the same; and that it was a question of fact for the jury, on the whole evidence, for what cause the arrest was made, and whether any cause other than the true cause was assigned by the officer, and whether in fact the defendants knew the true cause for the arrest. Other appropriate instructions were given, to which no exceptions were taken.

The jury returned a verdict of guilty in each case, and the defendants alleged exceptions.

J. Brown, for the defendants.

E. J. Sherman, Attorney General, for the Commonwealth.

C. ALLEN, J.—If the defendant in the first case was drunk and brawling in a railroad car, and persisted in continuing that offence by returning to the car after being removed therefrom, and by refusing to leave when requested to do so by the officer, the jury might well find that the arrest which followed was not for such refusal, but for continuing his offence. The statement by the officer to him, that he would be arrested unless he went out of the car, does not show that the arrest was for such refusal. As in the case of a criminal forcible entry and detainer, where the offence would cease with the abandonment of possession, the refusal to leave the car was coincident with the continuance of the offence, and by leaving the car the aggravation of the offence of drunkenness would cease. In cases of minor crimes, where the continuance of the offence can be checked by other means, it may some-

times be highly proper to omit making an arrest or a formal prosecution. The fact that the arrest in this case would have been waived if, upon request, this defendant had left the car, that is, if he had discontinued the offence of being drunk in a public place, which warranted his arrest without a warrant, cannot in any just sense be deemed to show that the arrest was not for the commission and continuance of the offence. The jury might naturally infer that the arrest was for being drunk under the circumstances stated, and that both of the defendants knew that it was for that cause.

The answer of the officer upon his re-direct examination was proper, in explanation of his testimony on cross-examination; and, besides, it appears to have been immaterial.

Exceptions overruled.

Expulsion of Passengers for Misbehavior on Train.—A person who is drunk so as to be objectionable to the other passengers, or who conducts himself in any manner which is indecent or improper and in violation of lawful police regulations, may be expelled from the cars of a railroad company. *Pittsburgh, etc., R. R. Co. v. Valleley*, 32 Ohio St. 345; *Vinton v. Middlesex R. Co.*, 11 Allen, 804; *Higgins v. Watervliet, etc., R. Co.*, 46 N. Y. 28; *State v. Ross*, 26 N. J. L. 224; *Marquette v. Chicago, etc., R. Co.*, 33 Iowa, 562; *Murphy v. Union, etc., R. Co.*, 118 Mass. 228; *Chicago, etc., R. Co. v. Griffin*, 68 Ill. 499; *Pittsburgh, etc., R. Co. v. Van Houten*, 48 Ind. 90; *Pittsburgh, etc., R. Co. v. Vandyne*, 57 Ind. 576; *Lemont v. W. & G. R. R. Co.*, 1 Am. & Eng. R. R. Cas. 268.

Company Not Liable for Unlawful Arrest by Servants.—In the absence of express authority of law and direction of the company to execute such authority, arrests made by servants in the course of their duties are held generally to be without the scope of their employment, and the company cannot therefore ordinarily in any event be held liable in damages. *Porter v. Chicago, etc., R. Co.*, 41 Iowa, 358; *Mali v. Lord*, 39 N. Y. 381; *Edwards v. London, etc., R. Co.*, L. R. 5 C. P. 445; *Allen v. London, etc., R. Co.*, L. R. 6 Q. B. 65. See *Thelin, et al v. Dorsey*, 18 Am. & Eng. R. R. Cas. 145.

KING *et al.*

v.

OHIO & MISSISSIPPI RY. Co. *et al.*

(*Advance Case, United States Circuit Court, D. Indiana, December 4, 1884.*)

A common carrier of passengers for hire is bound to see that no harm comes to a passenger from a fellow passenger, whose conduct and condition clearly show that he is a dangerous person and likely to injure his fellow passengers.

Where the conduct of a passenger is such as to clearly show that he is dangerous, it becomes the duty of the employes of the company in charge of the train to keep him in close custody and disarm him, or remove him from the train.

In cases of change of men in charge of passenger trains, the new men

should be informed of everything known to those retiring which ought reasonably to be deemed important to a proper discharge of the carrier's duty.

The conductor and brakeman of a railroad train removed a drunken and riotous passenger to a rear coach. Afterwards the conductor and brakeman were changed, but gave no notice to the new brakeman except that "there was a drunken man on the train who had given some trouble, but had quieted down." The drunken man afterwards shot and killed another passenger.

Held, that the company's servants should have confined the drunken man or put him off the train, and that they having failed to do so, the company was liable for the death.

CHANCERY. Intervening petition of Matilda Wingate, administratrix.

Percy Werner and Harrison, Miller & Elam, for receiver.
John M. Lausden and Angus Leek, for petitioner.

WOODS, J.—The claim in this case is for damages on account of the death of Alexander Wingate, who, on the 28th day of March, 1882, while a passenger in the cars of the defendant, going from St. Louis to Louisville, was shot and killed by one Haynes, a fellow passenger. Some time after the departure of the train from St. Louis, Haynes, who had been drinking freely, was transferred from a sleeping-car by the conductor and porter of that car to the coach at the rear of the train, in which Wingate was riding, and in which Haynes had been before going into the sleeper. The reasons for this transfer are not explicitly disclosed by any witness, but it is not an unfair inference that Haynes had given such proofs of drunkenness and disorderly conduct as made his removal from the sleeper proper, if not, indeed, necessary. He continued disorderly and troublesome until near Vincennes, when, according to the language of the brakeman, he quieted down. At Vincennes there was a change of conductors and brakeman, and notice given to the new brakeman by the retiring one "that there was a drunk man on the train who had given some trouble, but had quieted down." No other or more specific notice than this of Haynes' conduct between St. Louis and Vincennes was given to those who were to have and did have charge of the train upon the run from Vincennes eastward. In respect to the conduct of Haynes from the time of leaving Vincennes until the train had approached North Vernon, Indiana, when he shot Wingate, and himself jumped from the train and was killed by the fall, or drowned, there is conflict between the testimony of passengers and of the conductor and brakeman. The master has given credence to the testimony of the passengers, and, after rehearsing the evidence in some detail, concludes his report as follows:

"The rule of law upon which the claim for recovery is based in this case is comparatively new. It is this: that a common carrier of

passengers for hire is bound to see to it that no harm comes to a passenger from a fellow passenger whose conduct and condition clearly show that he is a dangerous person, and is likely to injure his fellow passengers. There is no doubt in this case that Haynes, who killed Wingate, was, at the time he fired the fatal shot, suffering from a fit of *delirium tremens*. If the employés of the receiver knew this, or should have known it from what they observed in Haynes' conduct prior to the shooting, and knew he had a revolver in his possession, the receiver, in the master's opinion, is liable.

"The master is also of the opinion that the receiver should be charged with notice of the facts that came to the knowledge of his employés, whether upon the east or west division of the road. There is a serious conflict in the evidence as to the extent of the knowledge by the employés of Haynes' condition, although, upon the statements of Burke and Fessenden, the brakeman and conductor west of Vincennes, and the statements of Newton, Kenner and Smith, the conductor, brakeman, and porter who were on the division east of Vincennes, it is apparent that the employés knew enough to require them, as prudent men, either to take charge of Haynes and guard him securely, or to have him put off from the train, to prevent his injuring passengers. They knew that he had been drinking between St. Louis and Vincennes. They knew that he had been ejected from the sleeping-car for misbehavior, or on account of his drunken condition. They knew that he was frightened, and had the delusion that somebody on the train was seeking to knock him down and rob him of his money. They knew that he had been trying to give his money away to some of the passengers on the train, and that he had asked the conductor to take charge of it for him. They knew that in going about the car he staggered or crawled over the tops of the seats from one place to another. They knew that by his misconduct he had compelled Mr. Collins and his wife and daughter to leave the seats they had been occupying and seek others, to avoid him. They knew that he was afraid to be left alone in the car when the conductor got out at Mitchell to go to the front of the train, and asked to be let go with him, and was pacified by the promise of the conductor that the brakeman would remain with him, the conductor promising to return in a few minutes. They knew that he had a revolver in his possession.

"Mr. Newton, the conductor on the east division, recommended him to take a drink of liquor, seeing his nervous and excited condition. This he certainly would not have done if he thought the man was getting drunk; it was because of his nervous and excited condition, which indicated clearly to his mind that the man was suffering from or on the verge of *delirium tremens*. The conductor and brakeman both speak of the weak, tremulous voice, indicating that he was in a state of childish fear of harm from

some one. Coming to the testimony of the passengers, the master cannot disbelieve the statements of Mr. and Mrs. Ousley, and Mr. and Miss Collins, that Haynes repeatedly exhibited and flourished his revolver in the car, in the presence of the brakeman, although the brakeman denies that he saw the revolver at any other time than when the conductor took up Haynes' ticket, some miles east of Vincennes. Mr. and Mrs. Ousley also swear that before the shooting Mr. Ousley warned the conductor, or the brakeman, that Haynes was dangerous, and that unless put off the train or disarmed would kill or injure some one with his pistol. The conductor insists that no remark of that kind was made in his hearing until after the shooting, but the preponderance of the evidence is the other way.

"Upon the whole case, the evidence shows, in the opinion of the master, that the passenger Haynes was not only dangerous, but that his conduct was such as to clearly indicate it in such a way that it became the duty of the employés of the receiver, in charge of the train, to keep him in close custody, and disarm him, or remove him from the train at the first station after they learned of his dangerous condition."

Damages assessed at \$5,000.

The criticisms made by counsel upon the testimony of some of the witnesses are not without plausible force, but not of sufficient weight to disturb the master's finding upon any material question of fact; and in respect to the proposition of law, "that the receiver should be charged with notice of the facts that came to the knowledge of his employés, whether upon the east or west division of the road," I am not able to agree with counsel that the master fell into essential error. I think it must be true, in cases of change of men in charge of passenger trains, like the one made in this instance, that the new men should be informed of everything known to those retiring which ought reasonably to be deemed important to a proper discharge of the carrier's duty. But, while I do not think that the information given in this case by one brakeman to the other was sufficiently full and explicit, I do not deem it necessary so to decide. In my judgment upon the conduct of the conductor and brakeman who took charge of the train at Vincennes, as shown by their own testimony, the liability of the receiver is put beyond reasonable question. Their testimony shows that the man Haynes was excited, nervous, tremulous and laboring under the manifestly unfounded delusion of pursuit by enemies, *on the train*, who would rob or kill or harm him in some way, and that in a childish but real fear of these things he appealed to the conductor for protection. Whether from excessive drinking or from other cause, it is clear that for the time being the man was insane; and, possessed of a pistol, as he was known to be, the conductor, as a man of common understanding, knowledge and experience,

ought to have apprehended the danger that he might mistake some passenger for his supposed pursuer, and shoot him down in imaginary self-defence

That it was in the lawful power of the conductor, under the circumstances, to have arrested, disarmed, restrained, or removed from the train this man, goes without saying. By the common law, and especially by the statutes of this State, ample powers in these respects are conferred upon conductors and other railroad employes. *Vinton v. Middlesex R. Co.*, 11 Allen, 304; *Railroad Co. v. Anthony*, 43 Ind. 183; *Railroad Co. v. Van Houten*, 48 Ind. 90; *Railroad Co. v. Vandyne*, 57 Ind. 576; *Railroad Co. v. Griffin*, 68 Ill. 506; Ind. Rev. St. 1881, Secs. 1702, 2091, 3922-3924. By these statutes it is provided that "the conductors of all trains carrying passengers within this State shall be invested with police powers while on duty on their respective trains, may arrest and detain any person found violating any law of this State," and, "when any passenger shall be guilty of disorderly conduct, * * the conductor is hereby authorized to stop his train at any place where such offence has been committed, and eject such passenger from the train, using only such force as may be necessary to accomplish such removal, and may command the assistance of the employes of the railroad company." "Whoever is found in a public place in a state of intoxication," and "whoever draws, or threatens to use, any pistol, * * * shall be deemed guilty of a misdemeanor." These powers, whether conferred by statute or deduced from the principles of law, are given for the safety of those who travel by railroad, and any failure in a proper case to exercise them, contributing to the injury of a passenger, is a breach of the carrier's contract, for which damages may be allowed. This conclusion is strongly supported by decisions made in analogous cases, cited in argument, of which see the following: *Railroad Co. v. Hinds*, 53 Pa. St. 512; s. c., 7 Amer. Law Reg. (N. S.) 14; *Railroad Co. v. Pillow*, 76 Pa. St. 510; *Flint v. Transportation Co.*, 34 Conn. 554; *Railroad Co. v. Burke*, 53 Miss. 200; s. c., *supra*; *Britton v. Railroad Co.*, 88 N. C. 536; *Railroad Co. v. Flexman*, 103 Ill. 546; s. c., 8 Am. & Eng. R. R. Cas. 354; *Stewart v. Railroad Co.*, 90 N. Y. 588.

Exceptions overruled, and judgment upon the report.

Company Bound to Protect Passengers from Assaults of Fellow Passengers.—A railroad company is bound to exercise a high degree of care to protect its passengers from the assaults and insults of fellow passengers.

Flint v. Norwich, etc., Transportation Co., 34 Conn. 554; *Holly v. Atlanta St. R. Co.*, 7 Rep. 460; *Pittsburgh, etc., R. Co. v. Pillow*, 76 Pa. St. 510; *Pittsburgh, Ft. W. & C. R. Co. v. Hinds*, 53 Pa. St. 512; *Putnam v. Broadway, etc., R. Co.*, 55 N. Y. 108; *Shirley v. Billings*, 8 Bush. 147; *New Orleans, etc., R. Co. v. Burke*, 53 Miss. 200; *Weeks v. New York, etc., R. Co.*, 72 N. Y. 56; *Goddard v. Grand Trunk R. Co.* 57 Me. 202; *Hendricks v. Sixth Ave. R. Co.*, 12 Jones & S. (N. Y.) 8; *Britton v. Atlanta & Charlotte Air Line R. Co.*, *infra*.

BRITTON

v.

ATLANTA & CHARLOTTE AIR LINE RAILWAY COMPANY.

(88 *North Carolina Reports*, 536.)

A railroad company has a right, and it is its duty, to establish and enforce reasonable rules and regulations for the government and direction of trains; and of such, the passenger must inform himself and conform thereto.

The company cannot relieve itself of responsibility for injuries received by a passenger where it is shown that such rules were not enforced, but their observance left discretionary with the passenger.

The right of a railroad company to assign white and colored passengers to separate though not unequal accommodations, is recognized by the courts.

The company owes to every passenger the duty of protecting him from the violence and assaults of his fellow passengers or intruders, and will be held responsible for its own or its servants' neglect in the premises, when the same might have been foreseen and prevented by the exercise of proper care. The plaintiff in this case was entitled to have the jury instructed that, taking the evidence to be true, the company is liable in damages for the injuries sustained.

Civil action tried at January Term, 1882, of Mecklenburg Superior Court, before Bennett, J.

The plaintiff in this action is a colored woman, and seeks to recover of the defendant company for injuries sustained by her while traveling on its train. The train was a special one for excursionists, running from Atlanta, Georgia, to Charlotte, North Carolina, on the 23d day of July, 1878. Handbills had been posted, advertising the time and terms of the excursion, and that separate cars would be provided for white and colored passengers.

The injuries complained of consisted in her being assaulted by a stranger, and forcibly ejected from the car in which she had been seated—it being the "smoking car," which had been provided for the white male passengers.

The case for the plaintiff is as follows: Having purchased a ticket at Greenville, South Carolina, she, in company with a man and woman belonging to her race, entered the defendant's train and occupied seats in the car in question. No one pointed out to them the cars intended to be occupied by the colored passengers, nor did she know that separate cars had been provided for the two races, or of the regulation of the company requiring it to be done. Before the train left Greenville, some one, a white person, not in authority, began to cast reflections upon the party, saying that "d—d niggers had no business in there," and when under way, others of the white passengers cursed them for being in the car, and declared that they didn't want "niggers" in that car;

and for the purpose of annoying them, sang vulgar songs and whooped and hallooed at the top of their voices. The man who accompanied the plaintiff, and whose name was Culp, spoke to the conductor in charge of the train about the conduct of the other passengers, and complained of it.

The conductor accepted the tickets of the three, and told them they might sit in that car, but as it was an excursion train, he could not control the conduct of the other passengers, and they might expect rudeness. Whenever the conductor was present, the misbehavior would cease, but as soon as he left the car, it was resumed. He was appealed to as many as four times to protect them from insult, but each time said he could not help it. While the train was stopped at King's Mountain station, a white man, whom none of the party knew, ordered them out of the car, when Culp asked to see the conductor. The man went out, soon others came in and said to Culp, "Get up and go out of here." He again asked to see the conductor and retained his seat, whereupon he was seized, beaten, and finally ejected from the car. The same persons then seized hold of the plaintiff, beat and badly bruised her, and finally put her and her companion out of the car, and threw their baggage upon the platform.

The plaintiff then went into another coach, which was filled with colored people, every seat being occupied, so that she had to stand for some time after the starting of the train, when some one got up and gave her a seat.

During the time the plaintiff and her companions were being ejected, neither the conductor nor any other employé of the defendant was present to protect them; nor did she see the conductor until after the train was in motion, when he came to where she was standing, and, when informed of what had taken place, said that he knew nothing about it, and that none of the other passengers knew anything about it. He gave her no seat, but went out, leaving her standing, and it was only through the kindness of another passenger that she got one at all, and then it was by an open window, and, being at night, she took violent cold.

The case shown by the defendant is as follows: The excursion had been extensively advertised by large handbills, in which it was announced that separate coaches would be provided for white and colored passengers. The train at Greenville was composed of six coaches, all substantially alike as to their conveniences and accommodations—the two next to the baggage car being reserved for colored passengers, the third as a smoking car for whites, and the others for whites generally. There was no notice on either the outside or inside of the coaches to indicate which were intended for whites or which for colored people, though at Greenville there was an announcement made to that effect by one of the brakemen in defendant's service. After leaving that station, the

conductor, in passing through the train, found the plaintiff and her party in the smoking car, and called for and accepted their tickets. He then said to them that the two forward coaches were intended for persons of their color, to which they replied that they were pleasantly situated, and preferred to remain where they were.

The instructions given by the company to the conductor were to advise such colored passengers as he might find in the coaches set apart for whites to go to the others, but if they declined to do so, to allow them to remain where they were, so long as they conducted themselves properly.

At some point before reaching King's Mountain, the colored man, Culp, in the presence of the plaintiff, complained to the conductor of the rudeness of some of the white passengers towards himself and his companions, and of the indecent language used in their hearing, when he was again told that he would find a pleasanter seat if he would go into the forward coaches, in which, at that time, there was a number of vacant seats.

The white persons in the coach, who were known to the conductor to be "wild young men from Atlanta on a spree," also complained of the presence of these colored persons in the coach, and inquired of that officer if he did not mean to put them off.

At another time the party complained to the conductor of being cursed and insulted by the others, when he said to them, that while he would not require them to go into the other car, he would still advise them as a friend to do so, and expressed some surprise at their unwillingness to do so, whereupon Culp said he desired to go, but that the females under his charge were unwilling.

The behavior of the plaintiff and her companions while in the car was entirely becoming, and their dress and appearance decent.

The train stopped at King's Mountain at eight o'clock P. M., and while there, one Ramseur, who was neither a passenger nor employé on the train, entered the smoking car, for the purpose of seating some white women who came in with him. The seats being filled, and seeing the two colored women there, he asked for their seats, which they declined to surrender. Some one in the crowd proposed to put them out, to which Ramseur assented and seized hold of the plaintiff. Thereupon Culp cried out, "Don't strike that lady," when Ramseur struck him over the head with a stick, and then, with the help of some of the white passengers, ejected all three from the car.

At the time of this occurrence, the conductor was in the baggage car, with the baggage-master, receiving and delivering baggage; and the other train hands, of whom there were three, had been sent for water to refill the coolers in the coaches. While there, the conductor was told that a row was about to take place in

the smoking car, and that his presence was needed, to which he replied that he would go as soon as he could start the train. In a minute or so he rang his bell, and as soon as the train moved, he started to the scene of disturbance, but when he reached the second coach from the baggage car, he there found the plaintiff and her friends. She was standing up and made serious complaints of his not having been present to protect her. He told her that she should have a seat; but by this time every seat was occupied, so that he was unable to provide her with one, and consequently had to leave her standing.

Amongst others, the following instructions were asked:

1. That upon the evidence, taken as a whole, the plaintiff was entitled to recover of the defendant compensation to the extent of her injuries.

2. That being permitted by the conductor to remain in the coach, she was rightfully there, and was under no obligation to give up her seat to another when ordered to do so, either by a fellow passenger or an intruder into the train.

3. That being rightfully there, it was the duty of the servants of the defendant to protect her, and to see that she was neither insulted nor injured by her fellow passengers, and for their failure in this regard the company is liable.

The instructions given were substantially as follows: The defendant, as a common carrier of passengers, had the right, in making up its train, to provide and set apart certain coaches for the exclusive accommodation of persons of each race; there is no law which prohibits their doing so, provided they observe substantial equality in the accommodations provided for both. If, on the occasion of this excursion, the defendant had made such provision for separate coaches for the two races, it was its duty to give notice of that fact to the passengers, and especially the colored ones. If the plaintiff, being a colored person, entered the coach in question set apart for whites, and while there demeaned herself decently and becomingly, no one but the conductor, or some one acting by his authority, had the right to remove her from the coach, or to require her to change her seat; and if no such instructions had been given by the conductor, then, when at King's Mountain, she was rightfully occupying the seat. It is the duty of common carriers of passengers to use the utmost care and diligence, consistent with human foresight, to convey their passengers safely, though they are not insurers of their safety. It is equally the duty of carriers to use the same care in protecting passengers against violence and injury at the hands of their servants, and likewise to come to their protection, when they are the object of attack or violence at the hands of their fellow passengers; and for a failure in the scrupulous discharge of duty in any of the particulars enumerated, they are liable in damages to any passenger whom they may fail to protect.

In conclusion, the jury were told that if satisfied the plaintiff was injured or wronged in the manner complained of, and that such injury or wrong resulted directly from the acts of defendant's servants, or from their failure to exercise that scrupulous degree of care which had been explained to them, then she was entitled to recover of the defendant for the injuries sustained.

The verdict of the jury was for the defendant upon all the issues, and after judgment thereon the plaintiff appealed.

T. M. Pittman and N. Dumont, for plaintiff.

Jones & Johnston and D. Schenck, for defendant.

RUFFIN, J.—The court has found no difficulty in concurring in many if not all of the propositions propounded in the charge of his honor to the jury, or in the positions assumed by counsel at this bar. No sort of doubt is entertained as to the right and, in some cases, the duty of carriers who undertake to convey passengers for hire, to establish and enforce reasonable rules and regulations for the government and direction of their trains, or as to the duty resting upon the passengers, when uninformed in regard to them, to inquire into and learn their established regulations, and, when instructed, to make their actions and movements conform thereto.

Equally well settled does it seem to be, both upon principle and authority, that amongst those reasonable regulations which they have a right to adopt, is the one of classifying their passengers, and assigning them to separate though not unequal accommodations.

This right, as regards the separation of the white and colored races in public places, has been expressly and fully recognized in many of the courts, both State and national. *Westchester R. R. Co. v. Miles*, 55 Penn. St. 205; *Day v. Owen*, 5 Mich. 520; *Hall v. DeGuir*, 95 U. S. 485.

In some of the cases it is said to be not barely a right appertaining to the carrier, but a positive duty, whenever its exercise may be necessary in order to prevent contacts and collisions arising from natural or well-known antipathies, such as are likely to lead to disturbances from promiscuous intermingling. If this be so, then in no case does it seem possible that it could so certainly attain to that standard, and become imperative upon the carrier, as on the occasion of an irregular excursion party, composed mainly of irresponsible and excitable individuals.

Satisfied, however, as the court may be of the correctness of the principles asserted, it is still at a loss to perceive what connection they have with the case in hand, or how in any way it could be made to be dependent upon them, since the evidence wholly fails to show that the defendant had, on this occasion, established any fixed or certain rule in reference to the matter. It is true,

that the handbills, by which the time and the terms of the excursion were published, announced that there would be "separate cars for white and colored," but whether this was one of the acts of the advertiser, resorted to in order to render the excursion popular with the better paying class of citizens, or whether it was intended to be a regulation for the government of the conduct of all parties, is left altogether uncertain. In the absence of all other proof upon the point, the court might and probably would put the latter construction upon it; but it is impossible to do so when the defendant shows, out of the mouth of its own witness and officer, that the real instruction given to the conductor of the train was, not to enforce it as a law of the company's making, but simply to give advice upon the subject, and then leave it to each individual to determine his or her own course.

The rules and regulations which the carrier has the right to adopt, in matters of this sort, must be such as are reasonable in their nature, and in their demands upon the passenger; and to be this, they must have for their first and main object the safety and convenience of the passenger, and must be uniform, positive and obligatory alike upon all parties. The carrier is presumed fully to understand the exigencies of such occasions, and how to meet them, and it is for him to decide and see that others obey; nor will the law permit him, by any equivocal or uncertain course of conduct—such as barely giving advice—to shift the responsibility from his own shoulders to those of the passenger.

When the plaintiff and her friends took seats in the coach in question, they did so in the exercise of a right and a discretion expressly left to them by the defendant's own regulation, and were therefore clothed with every privilege that appertained to any other passenger in the coach, and were entitled as fully as any other to be protected from injuries arising as well from the neglect of the company's servants as from the unprovoked assaults of their fellow passengers; and more especially was this so, after the conductor had been appealed to, and assured them of their right to the seats, even though he did offer the advice which he had been instructed to give them. So that the right of the plaintiff to recover in this action depends, as we conceive, upon no question connected with her color or with her presence in any particular coach in the defendant's train, but upon the general law regulating the duties and responsibility of the carriers of passengers in all such cases.

While in this State there seems to be no express authority as to the duty of the carrier to afford protection to the passengers against the assaults of his fellow passengers or strangers, we still have the decisions of other courts in regard to it, which, although comparatively recent, strenuously commend themselves to our consideration, as well by their right reasoning and plain sense of justice as by the high character of the tribunals from which they emanate.

According to the uniform tendency of these adjudications which we admit as authorities, the carrier owes to the passenger the duty of protecting him from the violence and assaults of his fellow passengers or intruders, and will be held responsible for his own or his servant's neglect in this particular, when, by the exercise of proper care, the acts of violence might have been foreseen and prevented; and while not required to furnish a police force sufficient to overcome all force, when unexpectedly and suddenly offered, it is his duty to provide ready help sufficient to protect the passenger from assaults from every quarter which might reasonably be expected to occur under the circumstances of the case and the condition of the parties. *New Orleans R. R. Co. v. Burke*, 53 Miss. 200; *Pittsburgh R. R. Co. v. Hinds*, 53 Pa. St. 512; *Pittsburgh R. R. Co. v. Pillow*, 76 Pa. St. 510; *Flint v. Norwich Transportation Co.*, 34 Conn. 554; *Thompson on Carriers*, 303.

Tested by this rule, and conceding that the facts of the case were as insisted upon by the defendant, and as proved to be by its own witnesses, the conduct of the defendant's servants, and especially of its conductor, was grossly and unpardonably negligent. He had knowledge of the reckless character of those who occupied the coach with the plaintiff; and while he may not have had positive premonition of threats towards her, he was fully aware of the dissatisfaction to which her presence there, with her companions, had given rise, and of the desire for their expulsion, which had been openly expressed, as well as of the fact that ribald songs and coarse and insulting language had been indulged in for the very purpose of vexing them and rendering their situation intolerable.

Circumstances such as these ought to have aroused, if they did not, the apprehensions of the officer for the safety of the plaintiff, and called for his constant and watchful interposition in her behalf, in order to protect her from insult and injury. His duty at that time was made so plain that the law itself will pronounce upon his conduct, and declare to be inexcusable his negligence in sending off upon other missions every other employé of the company, and betaking himself to the baggage car during the entire stay of the train at that depot. His dalliance, too, in going to her relief when informed of the imminence of the outrage upon her rights, manifested such an indifference on his part as was inconsistent with her claims and his duty. The duty which he owed to the defendant, of looking after the baggage of the passengers and putting the train in motion, was altogether secondary to that which, under the circumstances, he owed to the plaintiff, and should have been promptly subordinated thereto; and his failure to do this was another instance of negligence on his part, which brings responsibility upon the employer.

But above all this, the plaintiff had, as we have seen, acquired an established right to the seat which she occupied upon entering the defendant's train. She held it by the same tenure that every other passenger upon the train held his seat, and no one had the right either to call upon her to surrender it or to eject her from it by force; and upon being notified that her ejection had taken place, the first duty of the officer was to see her restored to it; and not until this was done, if demanded by her, was his whole duty, or that of the defendant, to the plaintiff, fully discharged.

The liability of the defendant to the plaintiff grows not out of the fact that she was injured, but out of the failure of its servants to afford her protection, after they had reasonable grounds for believing that violence to her was imminent, and also out of their omission to see her righted after the commission of the assault upon her, and her forcible ejection from her seat. The failure of its servants to discharge these duties to the plaintiff stands exactly upon the same footing as would their failure to discharge any other duty which the defendant as a carrier owed to her; and upon the maxim *respondeat superior*, their negligence rendered it liable.

Whether there is negligence, when the facts are admitted or proved, becomes a question of law for the court to determine, and, therefore, this court thinks the plaintiff was entitled to the instruction asked, that, taking the whole evidence to be true, she was entitled to recover of the defendant compensation for her injuries sustained by reason of the negligence of its servants. Because of the omission on the part of the judge below to give such instructions to the jury, she is entitled to a *venire de novo*.

Error.

Venire de novo.

Discrimination in Transportation of White and Colored Passengers.—According to some authorities reasonable regulations may be made by a common carrier for the transportation of white and colored passengers in different conveyances in different parts of the same conveyance.

Goines v. McCandless, 4 Phila. 255; *West Chester, etc., R. Co. v. Miles*, 53 Pa. St. 209; *Day v. Owen*, 5 Mich. 520; *Hall v. De Cuir*, 95 U. S. 485; *Green v. City of Bridgeton*, 9 Cent. L. J. 260; The Civil Rights Bill, 1 Hughes, 541.

But see *contra* *Railroad Co. v. Brown*, 17 Wall. 445; *Coger v. N. W. Union Packet Co.*, 87 Iowa, 145, and compare *Gray v. Cincinnati Southern R. Co.*, 11 Fed. Rep. 688.

In some States a carrier is expressly prohibited by statute from classifying its passengers according to race or color. *Central R. R. Co. v. Green*, 86 Pa. St. 427.

But such a law is unconstitutional in so far as it assumes to regulate interstate commerce. *Hall v. De Cuir*, 95 U. S. 485.

The reader is in this connection referred to the decision in the Civil Rights Cases, 109 U. S. 3, deciding the act of March 1, 1875, to be unconstitutional.

Duty of Company to Protect Passengers from Torts of Fellow Passengers.—A railroad company owes to its passengers the duty of guarding them from insults and assaults by their fellow passengers, when, by the

exercise of a high degree of care, such acts might have been prevented. *Pittsburgh, etc., R. Co. v. Pillow*, 76 Pa. St. 510; *Pittsburgh, Ft. W. & C. R. Co. v. Hinds*, 53 Pa. St., 512; *Flint v. Norwich, etc., Transportation Co.*, 34 Conn. 554; *Putnam v. Broadway, etc., R. Co.*, 55 N. Y. 108; *Holly v. Atlanta St. R. Co.*, 7 Rep. 460; *Hendricks v. Sixth Avenue R. Co.*, 12 Jones & S. (N. Y.) 8; *Goddard v. Grand Trunk R. Co.*, 57 Me. 202; *Shirley v. Billings*, 8 Bush, 147; *New Orleans, etc., R. Co. v. Burke*, 53 Miss., 200; *Weeks v. New York, etc., R. Co.*, 72 N. Y. 56; *King et al. v. Ohio & M. R. Co. supra*.

SMITH

v.

NEW YORK, SUSQUEHANNA & WESTERN RAILROAD CO.

(46 *New Jersey Law Reports*, 7.)

The clause in the act relative to vice and immorality, which prohibits traveling on Sundays, does not apply to the use of those trains of cars which are authorized to be run on those days.

A railroad company left a loaded car, coupled with two empty cars, standing on a switch which inclined towards their main track, the same being secured by their brakes and a railroad tie placed under the wheels of the loaded car; the cars got upon the main track, and thereby an accident occurred, the plaintiff being injured. *Held*, the company was not irresponsible, as a matter of law, even though the cars could not have got on the train track but for the wrongful act of a stranger.

ON rule to show cause.

The cause was tried at the Passaic circuit, at January term, 1883. On Sunday evening, December 11th, 1881, the plaintiff took passage in a train of the defendant at Wortendyke, for Paterson, having in her possession a ticket which entitled her to a passage upon that train. The train started under the management of the agents of the defendant, and when within about two miles of the city of Paterson, and traveling at the rate of eighteen miles an hour or less, the passenger car in which the plaintiff was sitting came into collision with a car loaded with stone that stood upon a siding near the track on which the passenger car was running. The passenger car was thereby thrown over, and the plaintiff sustained injuries. The verdict was for the plaintiff for the sum of \$10,000.

John W. Taylor, for the motion.

John W. Griggs, contra.

BEASLEY, C. J.—The plaintiff was a passenger in the car of the defendant, and was hurt by an accident to the train occasioned, as she claims, by the carelessness of the agents of the company.

The first defence interposed to the suit was that the occurrence in question happened on a Sunday, and that the plaintiff on that occasion was using the cars of the defendant in violation of the

law of the State. The proof showed that the plaintiff was traveling, not as a work of necessity or charity, and the position defensive to the action is that therein she offended against the first clause of the act for suppressing vice and immorality, and that consequently the defendant owed her no duty of skill or care as her safeguard whilst pursuing such forbidden occupation.

On the general subject thus adverted to the authorities are not in harmony. In some of the States a doctrine in this department is advocated which, if adopted, would be highly favorable if not conclusive for the defence, while in others the reverse view has found favor with the courts. Many of such cases are collected in the briefs of the respective counsel in this case, but such decisions will not at present be discussed, as the topic in its generality does not necessarily belong to the question now to be passed upon, for that question can be settled by an exposition of the statute which the defendant has invoked.

By the first section of the act for suppressing vice and immorality (Rev., p. 1227) it is provided, under the sanction of a penalty, that there shall be neither traveling nor worldly employment on the Christian Sabbath, with the exception of works of necessity and charity, and this prohibition is limited by a *proviso* in these words, viz., "That it shall and may be lawful for any railroad company in this State to run one passenger train each way over their roads on Sunday for the accommodation of the citizens of this State." The question arises, What is the proper meaning of this *proviso* in view of the established rules of statutory construction?

I think it plain that this exceptive clause has the effect to give not only to the company the right to run the specified trains on Sundays, but also confers the right upon the citizen to use such trains for ordinary travel. It is by this construction alone that the clause can be rescued from a liability to the charge of being nugatory and absurd. It would seem undeniable that it was the legislative intent either to authorize the common use of the trains in question, or to sanction the doing of this business by these companies founded, almost entirely, on perpetually recurring violations of law. Unless, by intendment, it is to be understood that *quoad* the trains in question, the citizen was absolved from the penalty denounced against traveling on Sunday, the boon granted to the railroads would, in substance, be the privilege of running their trains, provided they carried no passengers in them. I say this, in substance, would be the effect of the concession, for the class of persons who would use such means of transit in works of necessity or charity would be comparatively so limited, that their contributions to the expenses of running the trains could have no appreciable effect. The alternative is alone presented, to hold that general travel, to the extent in question, is permitted, or that the privilege granted in the *proviso* is utterly useless and vain. Noth-

ing is perceived in this act in its application to its subjects that seems to lead to the adoption of the latter branch of this alternative. The language of the *proviso* itself is general. The Sunday trains are to be run for the "accommodation of the citizens of this State"—that is, for their accommodation for all ordinary purposes, and not in the exceedingly restricted sense to accommodate them when engaged in works of necessity or charity. Besides, this provision is a remedial provision. It was passed in the year 1873 in the form of a supplement to the law relating to vice and immorality. The only conceivable defect existing in the old law, which it can be supposed this supplement was designed to amend, was its total prohibition of general travel on Sundays—a prohibition which, if rigidly enforced, would have put an end to all travel on the designated days in or through this State, and thus, in a measure, placed in trammels the intercommunication between the various parts of the country. It will be thus observed that if the interpretation of this *proviso*, which is claimed for the defence in this case, be correct, then we have here a remedial act whose tendency is not in any degree amendatory or corrective. In short, standing on such ground, we have here a legislative act that was intended to be useless to the companies to which the privilege was given; useless to the citizens of this State, and useless to the country at large. Such a construction is opposed to all the usual legal rules applicable to the subject. The legislative intention must control, and from the nature and purpose of this *proviso* it was the evident design to permit the use, in ordinary travel, of these specified trains.

This point was properly disposed of by the trial judge, and the proceedings cannot be disturbed on this ground.

The second objection to the course at this trial relates to the refusal of the judge to instruct the jury in accordance with certain requests handed in on the part of the defence.

The accident giving rise to the suit had been occasioned by a car loaded with stone, coupled with three empty cars, being on the track. It was shown that these cars had been put at a safe distance on a siding, and there was testimony tending to prove that the brakes had been put on all these cars, and a railroad tie placed beneath the wheels of the loaded car. The siding inclined towards the main track, and there was no direct evidence manifesting how it was these cars had come to be standing on the main track. The learned judge who presided at the circuit, after describing this position of things, and the grounds taken by the respective parties, gave this instruction to the jury:

"It is for you to say whether, in view of these contentions, the company did all that could, in reason, be demanded of them, having in view the risks of the service in which they were engaged, or whether they failed to do what prudence, foresight and skill

in that branch of the business ought to have suggested beforehand." The jury had previously been told "that the degree of vigilance, prudence, foresight, and skill required of the company and all its employes was that which, in contemplation of the dangers of the service, a reasonably prudent person should exercise."

The court was then requested by the counsel for the defendant to charge severally the four following propositions, viz.:

"1. That if the jury are satisfied from the evidence that if, on Sunday evening, the stone car with which the passenger car afterwards came into collision on that evening had been made fast by means of a bar and brakes, at a safe distance from the main track, and incapable of motion towards the same, without the removal of the bar and brakes, and the application of external force, and there was no want of due diligence in stopping the train, then the defendant is not guilty of negligence, and there can be no recovery.

"2. That if the jury are satisfied from the evidence that if, on Sunday evening and prior to the accident, the stone car had been made fast on the switch, and at such a distance from the main track as not to interfere with the trains thereon, and that the collision was produced by the loosening of the car by the unlawful act of a stranger, of which the company and its employes had no information before the collision, and there was due diligence used to stop the train, then the defendant is not guilty.

"3. That if the jury believe that the stone car was placed where it was at the time of the accident by a stranger, between the hours of half-past five p. m. of December 11th and the time of the accident, then the defendant is not liable in this action.

"4. That when an obstruction is placed upon a railroad by a stranger by accident or design, the company is not liable for the consequences, unless its agents have been remiss in not discovering it."

After considering carefully these requests, my conclusion is that the court did right in refusing to charge any of them in the form in which they were presented. Each of them, if adopted, committed the court to the doctrine that the action could not be supported if the cars in question were so securely fastened that, but for the intervention of extraneous force, they would not have got upon the main track, or if that, they would not have done so without the unlawful action of human agency. There is no legal measure by which it can be predicated, *as a matter of law*, that if a loaded car can be placed on a switch which has an inclination towards the main track, such car being so secured by its brake and a railroad tie under its wheels that it cannot change its position without the removal of such safeguards, such car is to be considered as secured with that degree of care, and skill, and prudence

which the law requires to be exercised in such matters. Such a question is essentially one for the decision of the jury. The judge could not properly be called upon to pass any opinion as to the sufficiency of the means that had been employed—nor that such means were legal if they would have held the cars in position without the application of “external force.”

Nor would it have been proper to have yielded to the request to tell the jury that the company was not answerable “if the collision was produced by the loosening of the car by the unlawful act of a stranger,” for this would have been tantamount to saying that a railroad company has the legal right to have a loaded car on a plane inclining towards their track in such a condition that it is subject to become freed from its restraints by an unlawful intervention of human agency, though such intervention should be the mere result of accident. If a person without right were upon the property of the company, and while there, from carelessness in passing, had trod upon and dislodged the railroad tie placed to keep the car in its position, and had thus been the cause of the accident, it is clear, in the words of the request, the “loosening of the car” would have been “by the unlawful act of a stranger,” and yet, I think it would not necessarily follow that the company would have been irresponsible for the consequences. I am not aware of any legal principle that would justify a railroad company in leaving loaded cars in such a situation that they could be caused to run on to its main track in the way of its passing trains, by the carelessness of persons passing by or by the act of children playing near their switches. From the brief of counsel, it would seem that it was supposed that some of these requests raised the question how far the company would be responsible on the assumption that the cars had been properly secured, and that they had been loosened and removed to the track by the intentionally wrongful act of a stranger. But the point was not made at the trial, and probably would have had no practical effect if it had been.

The verdict cannot be opened on this ground.

Nor was the amount of damages so large that the court can say that the jury was influenced by improper considerations.

Let the rule be discharged.

Sunday Laws.—It has been held in some cases that where a passenger is injured by the fault of a railroad company while traveling for pleasure or in pursuit of his ordinary business, he is debarred from recovering damages. *Stanton v. Metropolitan R. Co.*, 14 Allen, 485; *Feital v. Railroad*, 109 Mass. 398; *Smith v. Boston Railroad Co.*, 120 Mass. 490; *Lyons v. Desotelle*, 124 Mass. 387; *Bucher v. Fitchburg R. Co.*, 6 Am. & Eng. R. R. Cas. 212; *Day v. Highland St. R. Co.*, 185 Mass. 113.

On the other hand, there are numerous authorities holding that a party is in such case entitled to recover. *Etchberry v. Levielle*, 2 Hilton (N. Y.) 40; *Carroll v. Staten Island Co.*, 58 N. Y. 126; *Mahoney v. Cook*, 26 Pa. St. 342;

Sawyer v. Oakman, 7 Blatchf. C. Ct. 290; Schmid v. Humphrey, 48 Iowa, 652; Philadelphia Railroad v. Towboat Co., 23 How. 217; McArthur v. Green Bay Co., 24 Wisc. 139; Knowlton v. Milwaukee City R. Co., 16 Am. & Eng. R. R. Cas. 380.

See further Sparhawk v. Union Pass. R. Co., 54 Pa. St. 401; Augusta Railroad Co. v. Renz, 55 Ga. 126; State v. Baltimore & Ohio R. R. Co., 15 W. Va. 362; Yenoski v. State, 5 Am. & Eng. R. R. Cas. 40; Phila., W. & H. R. Co. v. Lehman, 6 Am. & Eng. R. R. Cas. 194; Commonwealth v. Louisville, etc., R. Co., 6 Am. & Eng. R. R. Cas. 216; Gulf C. & S. F. R. Co. v. Levy, 12 Am. & Eng. R. R. Cas. 96.

PARKS

v.

NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY.

(13 *Lea's Reports (Tennessee)*, 1.)

Under the Tennessee act of 1865, Chap. 15, which makes a railroad company liable to forfeit and pay a penalty of \$100 upon a failure of the company, during any one trip of the passenger cars, to announce the stopping-place or station at which the train stops, only one penalty can be recovered up to the bringing of the suit.

APPEAL in error from the Circuit Court of Obion county.

Matt. Neil, W. C. Caldwell and Jo. R. Hawkins, Jr., for Parks.

A. W. Campbell, for railroad company.

COOPER, J.—Action for the recovery of penalties under a statute. The circuit judge sustained the demurrer to the declaration. The referees report that the judgment should be reversed upon the ground that the plaintiff is entitled to recover in full as claimed. The exceptions open the case.

The act of 1865, Chap. 15, Sec. 2 (Rev. Code, Sec. 4927 b), provides as follows: "It shall be the duty of each conductor or other employé on any railroad in this State to announce in loud, distinct words, for each passenger car, the stopping-place, station, depot or town at which each car or passenger train stops, or shall be detained for any purpose, and also the time such car or passenger train will stop or be detained."

The next section is: "Every railroad company shall cause such passenger car to be well supplied with pure and wholesome water, and in cool weather have each passenger car provided with comfortable fires, and at night furnished with sufficient light for the use, comfort and convenience of the passengers."

The next section is: "Upon failure of any railroad company, during any trip of the passenger cars, to comply strictly with any of the provisions of the preceding sections of this act, then such

railroad company shall forfeit and pay the sum of \$100, recoverable before any court having jurisdiction thereof, one-half to be paid to the person suing, and the other half to go to the common school fund of the State."

The action was brought by George N. Parks against the Nashville, Chattanooga & St. Louis Railway to recover penalties alleged to have been incurred under the foregoing act, for the failure of the conductor or other employé of the company to announce, on its passenger trains, at the Paducah junction, a stopping-place of such trains, the station, and the time the train would stop or be detained. The declaration contained 240 counts, each for a separate penalty for a distinct failure of duty. The defendant demurred to the declaration, assigning as causes of demurrer, first, that the penalty sued for was unconstitutional, and, secondly, that the individual conductor or employé, upon whom the duty of performance was imposed by law, could alone be held responsible for the penalty, a corporation aggregate being incapable of incurring the penalty or being sued therefor.

Although the first section of the statute quoted above imposes the duty specified by it upon the "conductor or other employé," while the next section imposes the duties specified therein upon the railroad company, yet the intention of the legislature was to require certain acts to be done for the comfort and accommodation of passengers on railroad trains, and to secure their performance by a penalty for the failure, to be sued for by any person aggrieved certainly, and, perhaps, by a common informer. The regulations prescribed are within the police power of the legislature, and the mode adopted for their enforcement is one well known to the common law, and frequently occurring in our statutes. It is true, the penalty is usually imposed upon the person who is required to perform the duty, and whose delinquency gives the right of action. Corporations aggregate can only act through agents, and can only be subjected to the police power of the State in this mode by being made responsible for the default of their servants. Perhaps there can be no reasonable doubt of the liability of a corporation or superior in such cases, where the legislation is remedial, not punitive, although the subject is left in much obscurity by the authorities. The case before us may be decided upon well-recognized principles.

All the authorities agree that statutes like the one under consideration must be construed strictly. They further agree that a master or principal may be made liable for a reasonable penalty for the act or omission of an employé or agent in the line of his duty, where the penalty is remedial, not punitive. The inclination of the courts is, therefore, to construe such statutes as remedial, that is, as intended to redress an actual injury with a view to prevent its recurrence, and not as punitive, that is, as

intended to punish whether the injury has accrued or not. It is in the latter class of cases that the gravest doubts have been entertained whether the principal could be made liable at all to a penalty for the act or omission of the agent or employé. *Dickinson v. Fletcher*, L. R., 9 C. P. 1; *McCown v. New York Central R. R. Co.*, 50 N. Y. 176.

The intent of the legislature in the statute before us was to secure certain benefits to passengers on the railroad trains. It was, of course, never intended that a penalty should be incurred if in fact there were no passengers on the train, or in a car of the train in which there was a default. And a failure to call a station at which no passenger intended to get off, or did in fact get off, could do no harm, and would be at most only a technical breach of the law. If the statute be construed literally, or as punitive, there would be a penalty even in such cases. Penalties would also be incurred by acts of inadvertence or omissions of negligence, although no person was aggrieved thereby. And if each default gave a right of action, and might be sued upon at any time, the purpose of the legislature would be lost sight of, and the act be perverted and made punitive instead of remedial. The common law forbids the infliction of penalties or punishment more than once on the same offender, although guilty of several distinct offences. By that law (and it was so construed in this State) a conviction, judgment and execution for a felony not capital were a bar to all other indictments for felonies not capital committed previously. *Crenshaw v. State*, M. & Y. 123; 1 Bish. Cr. Law, Sec. 1070. And the courts have been always opposed to the enforcement of penalties except to the extent necessary to secure the manifest object of their infliction. For this reason, as we have seen, they are agreed in construing penal statutes strictly.

The act before us gives the forfeiture upon the failure of any railroad company to comply with its provisions "during any trip of the passenger cars." Under the rules of construction adopted by the courts, there would be only one penalty for each trip. The statute does not in so many words give the right of action to a common informer, and the argument is strongly persuasive, especially in view of the amount of the penalty, that the right of action is given only to a passenger aggrieved by the default. But if it be conceded that a *qui tam* action might be brought by any one, the statute does not say that there shall be a penalty for "each and every offense." In the absence of these words, it seems to be settled that only one recovery can be had for acts or omissions, in violation of the statute, prior to the commencement of the suit. 5 Wait's Act. and Def. 164. The reason is, that it is the action which will bring the default to the attention of the corporation or party, and secure a compliance with the law. And it is the performance of the duties imposed which enures to the

benefit of the passengers, on whose behalf the act was passed. A different construction would contravene the legislative intent, leave an opening for the perversion of the act, and make a statute punitive which was intended to be remedial.

Accordingly, under a statute giving a penalty against any person employing another to act as a pilot who has no license, it was held that there could be only one recovery against the defendant, although he had employed an unlicensed pilot for several ships. *Sturgis v. Spofford*, 45 N. Y. 446. The same ruling was made where a penalty of \$50 was given against any railroad company for taking more than a fixed rate of fare. *Fisher v. New York Central Railroad Company*, 46 N. Y. 544. "The omission from the statute of the words, 'for each and every offense,'" say the court in that case, "shows clearly that the legislature did not intend to open the door to a practice adopted in a case originating in another part of the State, now under advisement in this court, of opening a book account of penalties accrued, and delaying suit for a year when such penalties amounted to between twenty and thirty thousand dollars. A construction permitting this would defeat the intention of the legislature, which was to suppress the extortion by prompt prosecution, by enabling parties to forbear suing until the aggregate penalties amounted to a large sum, and induce others to do as one of the plaintiffs in one of the cases now in judgment was honest enough to testify he did; that was, to abandon other business, and spend his time for a considerable period riding back and forth from Tonawanda to Buffalo for the purpose of earning penalties."

The plaintiff in this suit has brought before us precisely the case presented to the Court of Errors and Appeals of New York under a similar statute. The decision of that eminent tribunal commends itself to our judgment and sense of justice. To allow a person to open a book account of penalties at an insignificant way station, and run up a charge of \$24,000 for the failure of the conductor to announce the station, or the length of stay, of which no passenger has complained, would shock the conscience, pervert the intention of the legislature, and turn a remedial into a highly punitive statute. It would be a literal construction of the words of the statute, which would recall the similar construction by a somewhat famous judicial tribunal of the middle ages of a law making it a capital offense to shed blood in the street, whereby an unfortunate leech was condemned to the gallows for bleeding his apoplectic patient on the sidewalk where he had dropped down. If the legislature had, in the act before us, in so many words authorized what the plaintiff has done, without any notice to the company, it would be difficult to sustain the constitutionality of the statute; for the effect would be the imposition of an excessive fine. Const., Art. 1, Sec. 16. But the legislature had no

such intention, and we shall not press the language used so as to do indirectly what could not, perhaps, have been done directly. The statute, both upon reason and authority, admits of a different construction. We are of opinion, therefore, that only one penalty can be recovered to the bringing of the suit.

The causes of demurrer assigned, strictly speaking, do not cover the grounds of our decision. But the statute which requires that demurrers shall state the objection relied on applies equally to cases at law and in equity. Code, Sec. 2934; *Kirkman v. Snodgrass*, 3 Head, 370. And we have uniformly held that when a bill contains no equity, it may be dismissed although the causes of demurrer assigned may not cover the real defects. *Lane v. Farmer*, 11 Lea, 568, 577. We have also held that although the demurrer be insufficient because bad in part, yet upon an appeal from the ruling of the court on the demurrer, the court would determine a question involved in the suit which would greatly narrow the contest, and tend to the speedier termination of the litigation. *Riddle v. Motley*, 1 Lea, 468. These rules equally apply to an action at law, the statutes regulating the demurrer and the appeal being the same.

The exceptions to the report of the referees will be sustained, the judgment of the court below reversed, and the cause remanded for a repleader with leave to the defendant to move to strike out all the counts of the declaration except one to be selected by the plaintiff, and with directions to the circuit court to proceed in accordance with this opinion by striking out the other counts. The defendant will pay the costs of this court.

TURNER, J.—This action involves a construction of three consecutive sections of the act of 1865–6, Ch. 15, brought into the Code by Sec. 4927, *a, b, c*, as follows:

“It shall be the duty of each conductor or other employé on any railroad in this State to announce, in loud, distinct words, for each passenger car, the stopping-place, station or depot, or town at which each passenger train stops, or shall be detained for any purpose, and also the time such car or passenger train will stop or be detained.

“Every railroad company shall cause each passenger car to be well supplied with pure and wholesome water, and in cool weather have each passenger car provided with comfortable fires, and at night furnished with sufficient light for the use, comfort and convenience of the passengers.

“Upon the failure of the railroad company, during any trip of the passenger cars, to comply strictly with any of the provisions of the two preceding sections of this act, then such railroad company shall forfeit and pay the sum of \$100, recoverable before any court having jurisdiction thereof, one-half to be paid to the

person suing, the other half to the common school fund of the State."

To correctly get at and understand the object of the legislature, it is necessary to keep in mind the wording of this statute as connected provisions throughout. It applies alone to "*passenger trains*." It contemplates the convenience and comfort of passengers only. The object of calling the names of depots, stations, etc., can reasonably have the two objects, one to keep the passenger advised of the fact that his destination has been reached, the other to inform strangers of the points on the roads, with perhaps the additional purpose of advising passengers whether they will have time to leave the cars and return for a continuation of the trip. Persons not passengers, and not desiring to be so, can have no interest in the performance of or the failure to perform the duties defined. Taking the entire law, and construing it as a whole, I entertain no doubt of the correctness of this construction. Would any one suppose the legislature had any intention to provide for the comfort, thirst or warmth of one who might be loitering about depots, or that it designed to furnish such an one lights at night from the lamps of the train?

The term "*the person*," employed in the third section, relates to the passengers, and means the passenger suing. While I think the legislature possessed the power under the constitution to pass the law, I also think that it must be so construed as to be confined to its effects upon passengers, or those who propose to be such in good faith, and for the purpose of going from point to point along the line of the particular road as travelers, and not to include such as travel solely for the purpose of speculation or profit to be derived from eavesdropping or playing the parts of spies or detectives; and that therefore the party suing must show that he was or intended to be such passenger, and was not traveling for the disreputable purposes indicated, and did not enter the train with a view to them.

The declaration should aver that the person suing was a passenger, or purposed to be one at the time and place of omission.

Cooke, Sp. J., concurs in this opinion.

FREEMAN, J.—This action is brought by plaintiff to recover penalties imposed by the act of 1865-6, for failure of the conductor or other employé of the company to announce, on its passenger train, at the Paducah junction, a stopping-place of said road, the station, and the time the train would stop or be detained. The declaration contained 240 counts, each for a distinct failure of duty. The defendant demurred to the declaration, and stated two grounds of demurrer: First, that the penalty sued for was unconstitutional; and second, that the person upon whom the duty is imposed by the law can alone be held responsible for its non-per-

formance—a corporation aggregate being incapable of incurring the penalty or being sued therefor. The demurrer was sustained by the circuit judge, and the defendant appealed.

The act of 1865 is one of a series of acts of our legislature passed under the police power to regulate the conduct of railroads, for the safety, convenience and comfort of the traveling public.

The first section requires persons who sell tickets to passengers at any station to open their offices an hour before the time of departure of trains, and for failure to comply with this requirement the delinquent is subjected to indictment or presentment, and on conviction is to be fined not less than twenty nor more than fifty dollars.

Sec. 2, Code, Sec. 4927, *b*, is: "It shall be the duty of each conductor, or other employé on any railroad in this State, to announce in loud and distinct words, for each passenger car, the stopping-place, station or depot or town at which each car or passenger train stops, or shall be detained for any purpose, and also the time such car or passenger train will stop or be detained."

The next provision is one regulating the fires, water and lights at night on said cars.

The next section, 4927, *d*, is: "Upon failure of any railroad company, during any trip of the passenger cars, to comply strictly with any of the provisions of the two preceding sections of this act, then such railroad company shall forfeit and pay the sum of \$100, recoverable before any court having jurisdiction thereof, one-half to be paid to the person suing, and the other half to go to the common school fund of the State."

This statute is clearly a command of the legislature, demanding obedience on the part of the railroad companies, and if within the constitutional competency of that body, it is to be construed and enforced as any other enactment. We must first ascertain its meaning, and then see that it be enforced as enacted. That meaning is to be ascertained from the language used, giving it the fair and natural construction which the words usually have in our language. There is no difficulty in doing this here, as there are no words of doubtful import; all are readily understood.

It is clear these provisions were intended to be penal; that is, the money to be paid on violation, when suit is successfully prosecuted, was intended as a punishment for the breach of the law. It is certain it was not intended to be compensatory in any sense, because an arbitrary amount is fixed for any case, and one-half only goes to the party suing, the other to the common school fund.

What, then, is the meaning of the provisions of Sec. 4927, *b*? It requires, in plain terms, that the conductor or other employé of the road shall announce, as required, for each passenger car, the stopping-place, station or depot at which each car or passenger

train stops, or shall be detained for any purpose, and the time such train will stop. This is too plain to be misunderstood. Whenever a train stops at a station, depot or town, this announcement must be made, or the statute is not obeyed. It is violated by any failure. Such violation may take place at any station on a trip from one point of departure to the destination of the train where the train may stop. Ordinarily it can only occur on the same trip but once at the same station, as the train can only pass that place once on a trip. The language of the section imposing the penalty is: "Upon failure of any railroad company during *any* trip of the passenger cars to comply strictly with *any* of the provisions of the preceding sections, then the company shall *forfeit* and pay the sum of \$100, recoverable before any court having jurisdiction thereof, one-half to be paid to the person suing, and the other half to go to the common school fund."

What is the requirement that must be strictly complied with? The conductor or other employé on any railroad *is to announce in loud and distinct words, for each passenger car, the stopping-place, station, or depot or town*, at which each car or passenger train stops, or shall be detained for any purpose, and also the time such car or passenger train will stop or be detained.

This duty is so plainly written, there can be no misunderstanding it, that the announcement must be made of "the stopping-place, station, or depot or town at which *each* car or *passenger* train stops." Whenever a place, station, depot or town is stopped at by a car or passenger train, the duty must be performed. To comply with this law at any station where such stoppage takes place, the announcement must be made. This is too clear for argument. Suppose, for instance, on any trip from one point to another, at one-half the stations or stopping-places the announcement is made, the other half not: it cannot be doubted that the law has been complied with half the time, and the other half has been violated—if six stations, the law will have been complied with three times, no one can doubt—but it is equally certain at the other three stations has not been obeyed; compliance and non-compliance are precisely the opposites each of the other—what, if done, is compliance, if omitted, is non-compliance.

When is the penalty or forfeiture incurred? is the next question. The language of this statute must be taken in its ordinary and well-understood meaning, and when this is seen, it must be held to be the intention of the legislature, and so enforced. If this be not the rule, then the legislature may say one thing and the courts say another, and the citizen could never know what he must do or avoid until the courts have said what it means.

The language is, and the mandate is, unmistakable, "upon failure to comply strictly with *any* provision of the two preceding sections (the other not being before us, the one quoted being

alone involved), *then* such railroad company shall forfeit and pay the sum of \$100, and that on any trip. This is as plain as the other. It is the moment there is a failure to comply strictly the forfeiture is incurred—*then* the right accrues to some one to sue. There can be no doubt of this proposition.

Now, suppose a failure at the first three stations on a trip: at the first a passenger stops supposing the train will remain fifteen minutes, but it leaves in five, and he is left. He immediately sues the company before a justice of the peace, and so on at each station the same thing occurs: what shall be the measure of recovery? Can each recover the \$100? If so, why? Because the forfeiture of that sum had been incurred the moment the *act* is not complied with. It is impossible to avoid this result unless you hold that the first man that sues is to recover \$100, and this shall cover all subsequent violations. If this rule be adopted, then how far shall it reach, and what length of time shall it cover?

If, however, all three can recover, that is, each for a single completed act, then we are compelled to say the company has violated the law three times, each failure a violation, when sued for the act by different individuals at different times; and as any man can sue for the penalty, on the view of two of the judges, my brothers Cooper and the Chief Justice, why one man may not recover on different causes of action complete of themselves, as well as a dozen separate individuals, is what I am unable to see, even should he be required to sue in separate actions. A man has six different notes due for \$100 each. If he assigns them to six different men, each may sue on the note he has, because it is a complete cause of action. But the theory of my brother Cooper, if applied to such a case, would hold that, if he sued himself, he could only recover on one note, and the others be for nothing held. I know my brethren would not hold this, but the logic of the opinion involves it, or else you must show an element differentiating the case before us from the one supposed. None can fairly be shown, as I think. The note is but an obligation to pay, say \$100, and gives a completed right to that sum in the holder, because the *law* will enforce it, and gives the right of recovery on it. The same is the case here; the law gives the right to recover \$100 for each failure to comply with the statute. It is to be recovered as penalties are recovered by the old action of debt at common law with us in both cases, on the statement and proof of the facts of the case, showing the legal right.

Let us look for a moment at the principle held by the opinion of my brethren Cooper and Deaderick, as given in the syllabus of his opinion, drawn by Judge Cooper: It is, "Under the act of 1865 (Rev. Code, Sec. 4927, *b*, *c* and *d*), which makes a railroad company liable to forfeit and pay a penalty of \$100 upon a failure of the company, during any one trip of the passenger cars, to

announce the stopping-place or station at which the train stops, only one penalty can be recovered up to the time of bringing the suit." That is to say, only one penalty can be recovered for 240 failures, as in this case. But in this case the judgment is that he may recover \$100, and may select any one count of his declaration, and recover on that if he prove his case.

I submit that if any plain man should read the statute, and then what is thus held, if he would not be compelled to conclude that in this case the legislature had enacted one thing and the court another. To test this: if under the common law doctrine of implied repeals of statute, by approximately enacting a different rule, the legislature had enacted that for every failure to announce the station where a train stops on a trip, the company shall forfeit and pay \$100 to whoever shall sue for the same, and then a subsequent legislature should enact a law, "*Be it enacted, etc.*, that hereafter when a railroad company shall fail on any trip to announce the station whenever the train shall stop, that \$100 shall be forfeited, and recovered by whoever may sue, and this shall be for all failures incurred before bringing suit," if the latter statute would not be a repeal of an essential feature of the former? If not, it is because the language of the statute cannot be antagonized or inconsistent with another, as I think. My learned brethren see clearly, no doubt, the grounds of these views, but I am unable to make consistency with the statute out of these.

The logical result of this opinion is, that a hundred violations of the requirement of the statute, or rather. 240, as in this case, only incurs one penalty, where one man sues for the failure to comply with the statute. Concede that as now settled, and I ask, how will it be if 240 should each sue in separate cases? Again, how is it that one case of violation to be selected by plaintiff, and he recover for that? Is that one violation any more heinous than the other two hundred and thirty-nine? If so, why and how? Shall one violation give a penalty of one hundred dollars, and 240 no more?

But the result of that opinion goes even further necessarily, for it involves, and it cannot be avoided or evaded, the proposition that these separate violations may occur, and did in this case necessarily occur, on separate trips of the trains, for the train could only pass and stop once on each trip, or on a single trip, and so we have the statute practically to mean that the railroad companies may violate the statute every day of the year, or even for five years (for if two hundred and forty times incurs but one penalty, a thousand would incur no more), and yet pay only one hundred dollars, certainly in the case where one man shall sue for the violations, or how it would be if a man should sue in each case, I am not able to say, and think my brethren will find it difficult to tell. One violation incurs the same penalty as two hundred and forty,

and of necessity it follows a thousand would give the same result. The result is, as I think, the statute is practically repealed. It might be interesting to settle the question suggested as to what would be the result if a separate person should sue for each violation or failure to comply with the law. As to the New York cases cited, I have but to say that the case of *Fisher v. New York Central Railroad*, 46 N. Y., 644-8, I have examined, and I see no similarity in the two statutes, nor objects and purposes. The opinion of the court in that case, as expressed in the reasoning of the judge on such a case as is now under consideration, sustains precisely the views I have maintained, for which numerous cases are cited. The statute involved was held to be a remedy given to encourage parties to sue who had been compelled to pay over fare, and the fifty dollars compensation to encourage suit for this purpose. No such feature is found in this statute, no such purpose to be subserved.

I have only to say, that with proper deference and respect for the courts of a sister State, they are no authority when I am called on to construe an act of my own State legislature, if they require me to disregard the plain language of that body. If anything in the cases cited does sustain the view combatted (as I do not think they do when taken in connection with the cases then under consideration), they are simply unsound; my judgment does not approve, and I am compelled to stand by my own opinion. The consideration that I have felt of most weight in this case is, that so far as the plaintiff is concerned, there is no merit in it, and a large recovery would be had on my view of the law. But the answer is, that there is no merit in the same sense in any case where a common informer sues, as in all cases of a *qui tam* action. But this consideration loses all its force when we remember that no penalty can ever be recovered if the law has not been violated. The violation is the act of the defendant, and why a railroad corporation shall violate a plain law, and then not pay the penalty imposed by law, and to the party the law gives that penalty, I do not see. If the party fails to prove a violation, he will pay costs and attorney's fees for his pains. If he proves the violation, then the recovery is legally due, and I will give it. If the statute is not a good one, let the legislature change or repeal it. But until then it must be enforced, or the law of the land is trampled under foot. I cannot assent to such a result, whether the amount be great or small; nor does this affect the proper legal result the weight of a feather. I but add, that I am equally clear that the demurrer does not raise the question on which the court has acted, and that we ought not to have decided anything except what the court below had ruled on.

A word only as to the view maintained by Judges Turney and Cooke. It is, as I understand it, that the penalty is given for the

benefit of the passengers on the cars alone—certainly that none but a passenger can sue. This must go on the idea that the passenger who is inconvenienced by the failure to comply with the regulations required by the statute is wronged, and has his remedy to redress this wrong. But it is also held that only one can sue, and not every passenger, or every one injured. The last would have led to consequences that could not be justified—that is, if any passenger could sue. It might be worse than the present case on the companies. This view seems to me not sustained either on principle or from the language of the statute. The language is, the company failing to comply “strictly with the provisions,” shall forfeit and pay the sum of one hundred dollars, recoverable before any court having jurisdiction thereof, one-half to be paid to the person suing, and the other half to go to the common school fund of the State.” How this language is to be limited so that only a passenger can sue, I am unable to see. The statute is either a penal one, or is intended to be compensatory to passengers injured. If penal, then it would be a requirement, as I think, never heard of before in such a statute, that only a passenger on the train should be entitled to enforce it. They generally would be the persons least likely ever to do so of all others, as such passenger would not probably live at or desire to remain at the station long enough to prosecute such a suit.

But if it be compensatory, which, I take it, is the view underlying the opinion, then, on what principle it can be given to only one man is beyond my ken to see. Who shall it be? The first man that sues? It may be he is a man not injured in the slightest. The station may be his home, and he ready to step out without notice. But why the first man that sues shall be alone entitled to compensation for a wrong equally affecting all the other passengers desiring to stop at that station, it would be difficult to see. Why the compensation should be just one hundred dollars, one-half to the first man that sues, and the other to the common school fund, is still more difficult to see. The “common school fund,” I take it, is not likely to be injured by any failure to comply with the requirements of the statute; why give compensation to it? It is not a *passenger*.

I only add, that it is obvious the views of the two opinions are entirely antagonistic to each other. The one holds the statute penal, the other compensatory. If the first be correct, the difficulty is, why confine the right to sue to a passenger? If the latter, then why to the first man that sues, and give half the recovery to the “common school fund” that is entitled to no compensation, and then only allow compensation to one man, while others equally injured go uncompensated?

For these reasons I am compelled to dissent from both views.

Statutory Obligation to Stop at Stations.—The reader is referred to the following authorities upon the subject of the obligation of a railroad company under express statutory provisions to stop its trains at certain stations.

State v. New Haven & Northampton Co., 43 Conn. 851; *N. H. & N. Co. v. Hamersley*, 2 Am. & Eng. R. R. Cas. 418; *Penn. Co. v. Wentz*, 3 Am. & Eng. R. R. Cas. 478; *Chicago & Alton R. Co. v. Pierson*, 13 Am. & Eng. R. R. Cas. 156; *Chicago & Alton R. Co. v. People*, 13 Am. & Eng. R. R. Cas. 42; *Atty.-Genl. v. Erie & Kalamazoo R. Co.*, 16 Am. & Eng. R. R. Cas. 652.

ILLINOIS CENTRAL R. Co

v.

STONE *et al.*

(*Advance Case, U. S. Circuit Court, S. D. Mississippi, 1884.*)

A railroad company—purchaser of another railroad—having received a charter from the State through which the latter ran, conditionally upon its payment to the State of the debts of the purchased road, became thus a party to a contract to which the State was the other party, and any law of the State subsequently made restraining the company in its rights under the charter is “a law impairing the obligation of contracts,” and therefore void.

The right to fix and regulate the rates to be charged for the transportation of persons and property is not incidental to the police power of the State, and an act making it lawful for a railroad company to fix and regulate its own charges is a contract whose obligation the legislature cannot impair by regulation of such rates.

The act of the Mississippi legislature of March 11, 1884, regulating the rates of transportation of railroads, is, so far as it relates to the Mobile & Ohio R. Co., a railroad incorporated in several States, and running therein, a regulation of inter-State commerce, and void.

Sur motion for a preliminary injunction.

HILL, J.—The questions now presented for decision arise upon complainant's motion for a preliminary injunction to restrain the defendants, as railroad commissioners for the State of Mississippi, from in any way interfering with the complainant or its agents in the management and business of operating its railroad. The questions presented have been most ably and exhaustively argued by the distinguished and learned counsel on both sides, and are questions of momentous importance to the people, and to the commercial interests of the country at large, as well as to the complainant, and all whose interest it represents. The facts set forth in the bill, not being controverted, for the purposes of the motion are to be taken to be true. These facts, so far as they relate to the questions now to be decided, are, in substance, as follows:

“The complainant corporation was created by an act of the legislature of the State of Illinois, and is the owner of and operates the Illinois Central Railroad, and its branches and connec-

tions, running north from the city of Cairo, in the State of Illinois, and is the lessee of and operates the Chicago, St. Louis & New Orleans Railroad and its branches, extending south from Cairo to the city of New Orleans, in the State of Louisiana. The Chicago, St. Louis & New Orleans Railroad Company is a corporation created by the legislature of the States of Louisiana, Mississippi, Tennessee, and Kentucky, as a continuous line of railroad communication between the cities of New Orleans and Cairo, and there to connect with the Illinois Central Railroad and its branches and connections, so as to afford a connected line of transportation for persons and commercial commodities from the city of New Orleans, and its commercial connections on the Mississippi River, Gulf of Mexico, and railway connections, and all intermediate connections by railroad or water, from New Orleans to the terminus of the Illinois Central Railroad, its branches and connections, thus affording a great commercial highway from the gulf on the south to the lakes on the north."

The bill further alleges that the purpose of those who built this extensive channel of commercial communication, and the United States, the States, the counties, and the people, who have contributed thereto, and which they would not otherwise have done, was to establish a highway for the transportation of persons and articles of commerce for the benefit of themselves and all others who might desire to avail themselves of this means of rapid transit from one part of the United States to another, and to other parts of the world, and over which hundreds of thousands of persons and many millions of property are constantly being transported, and have been for years past, without interruption from any State authority, until recently.

The bill further states that the Chicago, St. Louis & New Orleans Railroad Company became the owner by purchase, under the decrees of this court, of the Mississippi Central Railroad and of the New Orleans, Jackson & Great Northern Railroad, and all the property connected therewith owned by said railroad companies; the former extending from Canton, in the State of Mississippi, to Cairo, in the State of Illinois, passing through the States of Tennessee and Kentucky, and the latter from New Orleans, in the State of Louisiana, to Canton, in this State, both being inter-State railroads; and by said purchase became vested with all the rights and privileges of the debtor corporations, the sales having been made to satisfy debts owing by said corporations respectively. That as a condition upon which the corporate powers were, by the legislature of the State of Mississippi, granted to the Chicago, St. Louis & New Orleans Railroad Company, it was required of said corporation that it would pay to the State all the indebtedness due from said corporations whose property and rights had been so purchased, and for which said purchaser

was not responsible, and which payment, to the amount of \$158,978.82, has been made; that under the chartered rights so purchased, and the act of incorporation, it is expressly granted to said corporation the right and power to adapt, establish and change at pleasure a tariff of charges; that the same right and power was granted to the debtor corporations which was so purchased by complainant's lessor, together with the right and power to select all necessary officers, agents and employes, and to control and manage and operate said railroad, and all the business and property connected therewith.

The bill further charges that the legislature of the State of Mississippi, on the 11th day of March, 1884, passed an act, which has been approved by the governor of said State, entitled "An Act to Provide for the Regulation of Freight and Passenger Rates on Railroads in this State, and to Create a Commission to Supervise the Same, and for Other Purposes;" that under the provision of this act the defendants have been appointed and commissioned as such commissioners, and have entered upon the discharge of their duties as such, and threaten to interfere with the rights of complainant, to which it has succeeded as such lessee, and which have been enjoyed and exercised by those whose rights complainant has purchased, for a quarter of a century, without just complaint, which interference, it is alleged, if permitted, will greatly injure and embarrass complainant in the management and control of said railroad, and the transportation of persons and freight over the same, in violation of the just rights and privileges so purchased and granted, and in violation of and in conflict with the Constitution of the State of Mississippi and of the United States, and from doing which the bill prays the defendants may be restrained and enjoined by the decree of this court.

Whether the act of the legislature creating the commission, and giving it the powers and imposing the duties therein provided, is wise or unwise, on the one hand, or whether the acts of the complainant intended to be controlled by it are just grounds of complaint, on the other, are questions over which this court will not undertake to decide. The only question is, did the legislature have the power and authority, under the Constitution of the State of Mississippi and the United States, to enact the law? Or, to state the question in other words, do any of the provisions of the act, and if so, which of them, violate or conflict with any of the provisions of both or either of these constitutions? If they do not, then the act must be maintained, and the complainant, if suffering a wrong, must apply to the legislature for relief; but if they do, then the act, so far as it does violate any of these constitutional rights, must be declared void, and treated as if the act had never been passed.

It is a well-established and cardinal rule, as expressed by Chief

Justice Marshall in the case of *Fletcher v. Peck*, 6 Cranch, 87—
 “That the question whether a law be void for its repugnancy to the constitution is at all times a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative in doubtful cases. The court, when impelled by duty to render such a judgment, would be unworthy of his station could he be unmindful of the obligation which that station imposes. But it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the constitution and the law should be such that the judge feels a strong conviction of their incompatibility with each other.”

But when the judicial mind is clearly satisfied of the repugnancy of the legislation to the constitution, the fundamental law, then the court has no alternative but to so declare it, and to hold the act of the legislature void. Another rule is, that when there are different and distinct provisions in an act, and some of them are in conflict with the constitution and others are not, that such as are violative of the constitution are declared void, and the others valid.

Before considering the provisions of the act complained of, it is necessary to consider the nature and character of the rights of the complainant corporation. The rights of the lessor corporation are of a two-fold character: *First*, to provide and maintain a great inter-State commercial highway for the transportation of persons and property from one State to another, and from one commercial mart to another; *secondly*, to make a return to those who have invested their money in the enterprise, either originally or by purchase, by way of dividends or interest upon the capital invested.

Complainant's road is a public highway, so far as it affords to all a means of transportation upon payment of a reasonable compensation for the service to be performed, the right to receive which is conferred by the charter granted to the Chicago, St Louis & New Orleans Railroad Company, and the right and power to fix and change at pleasure the rate of charges given in the charter must be understood as reasonable compensation for the services rendered or to be rendered. The complainant, being a common carrier, is liable to be amerced in damages, not only compensatory, but punitive, for refusing to transport persons or property, suitable for transportation, upon the payment, or tender of payment, of such reasonable compensation. The question of what is reasonable compensation in such cases is one alone for judicial ascertainment, when not fixed by the charter, and no power is reserved therein, thereafter, to fix it.

The rights granted in the act of incorporation, and accepted, constitute a contract between the State of Mississippi and the Chicago, St. Louis, & New Orleans Railroad.

The doctrine that the rights, powers and privileges granted by the legislature in the acts of incorporation, when not violative of any provision of the Constitution of the State or United States, and not invalid, constitute a contract between the parties, which is protected by the tenth section of the first article of the Constitution of the United States, was first announced by the Supreme Court of the United States in the case of *Dartmouth College v. Woodward*, 4 Wheat. 565, and has been strictly adhered to by that court from that time to the present. Reference to the repeated decisions of that court sustaining this position need not be referred to. These chartered rights, however, are in all cases subject to the police power of the State, with which it is not at liberty to part, and may be granted and withdrawn at the pleasure of the legislature. These police powers relate to the public peace and safety, public health, public morals, and the like. The Chicago, St. Louis & New Orleans Railroad, upon its creation, became vested with and entitled to all the rights and privileges granted by the charter, and was entitled to all the protection under the law, and subject to all the liabilities that an individual would have been entitled to, or liable for, in like condition. A private corporation—and in one point of view complainant is such—although serving a great public purpose, is an association of individuals for a lawful object. The great object of an incorporation of this character is to give individuality and perpetuity to a collection or body of men for the accomplishment of a common end.

It will be sufficient, for the purpose of disposing of the present motion, to consider only two of the objections stated in the bill to this act of the legislature as violative of the Constitution of the United States, either of which, if well taken, must dispose of the motion. The first, and the one which lies at the foundation, is that it violates and is in conflict with the tenth section of the first article of the Constitution of the United States, because it impairs the obligation of the contract made between the State of Mississippi and the Chicago, St. Louis & New Orleans Railroad Company, the lessor of complainant, by which said corporation was vested with the power "to make contracts, and to adopt and establish such tariff of charges for the transportation of persons and property as said corporation might think proper, and the same to alter and change at pleasure."

By the sixth section of the act of the legislature complained of, it is provided that—

"All persons or corporations who shall own or operate a railroad in this State shall, within thirty days after the passage of this act, furnish the commission with its tariff of charges for transportation of every kind, and it shall be the duty of said commission to revise said tariff of charges so furnished, and determine whether or not, and in what particular, if any, said charges are more than just com-

compensation for the services to be rendered, and whether or not unjust discrimination is made in such tariff of charges against any person, locality or corporation; and when said charges are corrected, as approved by said commission, the commission shall then append a certificate of approval to said tariff of charges; but in revising or establishing any and every tariff of charges, it shall be the duty of said commission to take into consideration the character and nature of the service to be performed, and the entire business of such railroad, together with its earnings from the passenger and other traffic, and shall so revise such tariffs as to allow a fair and just return in value of such railroad, its appurtenances and equipments; and it shall be the duty of said commission to exercise a watchful and careful supervision over every tariff of charges, and continue such tariff of charges from time to time as justice to the public and each of such railroad companies may require, and to increase or reduce any of said rates according as experience and business operations may show to be just; and said commission shall fix accordingly the tariffs of charges for those railroads failing to furnish tariffs as above required. And it shall be the duty of said railroad company, or persons operating any railroad in this State, to post at each of its depots all rates, schedules and tariffs for the transportation of passengers and freights, made or approved by said railroad commission, with said certificate of approval, within ten days after said approval, in some conspicuous place at such depot; and it shall be unlawful for any such person or corporation to make any rebate or reduction from such tariff in favor of any person, locality, or corporation which shall not be made in favor of all other persons, localities, or corporations, by a change in such published rates, except as may be allowed by the commission; and when any change is contemplated to be made in the schedule of passenger or freight rates of any railroad by the commission, said commission shall give the person or corporation operating or managing said railroad notice in writing, at least ten days before such change, of the time and place at which such change will be considered."

It is very clear that this act, if enforced by the commission, will deprive complainant of the right to adopt by its duly appointed officers and establish such a tariff of charges for the transportation of persons and property as it may think proper, and the same to alter and change at pleasure, which right is conferred upon the Chicago, St. Louis & New Orleans Railroad Company by its charter, and to which the complainant is entitled under the lease executed by said company to the complainant, and which has been approved by the legislature. This right and power was granted by the State in the charter, which was accepted by the Chicago, St. Louis & New Orleans Railroad Company without any conditions, restrictions or limitations upon its enjoyment and

exercise, and without any reservation upon the part of the legislature to thereafter impose them. But there was a condition imposed in the charter of a different character, and that was, that the corporation should pay to the State an indebtedness due to it from the Mississippi Central Railroad Company, and for which the corporation was in no way liable, amounting to the sum of \$158,978.82, which has been paid. Taking the purpose of those contributing to the establishment of this great commercial highway, and the consideration so paid, I can come to no other conclusion than that this charter, with this right and power so given and accepted, constituted a contract between the State of Mississippi and the corporation which is protected and is inviolate under the tenth section of article one of the Constitution of the United States, the great sheet anchor of the rights of corporations as well as individuals, and this conclusion is strengthened by the fact that the right upon the part of the owners of these railroads to charge and receive a fair and reasonable compensation for the money expended by them, and those from whom they have purchased, in building and operating them, is as necessary as is blood to imparting life and motion to the human body, and without which neither can long exist. I am satisfied that not only the sixth section of this act, but several others, violates this contract so secured by the constitutional provision, and renders the whole act void so far as it relates to the exercise of any power or control by the commission created by it over the Chicago, St. Louis & New Orleans Railroad so possessed and operated by complainant.

With this conclusion thus reached, I might dismiss the subject without further comment, but it has been pressed with great force on the one side, and with equal earnestness and ability resisted on the other, that this act of the legislature is in conflict with and violates the eighth section of the first article of the Constitution of the United States, because in purpose and effect it is an attempted regulation of commerce among the States—a power which is vested exclusively by this provision of the federal constitution in the Congress of the United States. This is a grave and important question, in which all concerned are deeply interested. As already stated, the right to demand and receive compensation for the expense incurred in building, equipping and operating this wonderful and immense mode of transportation of persons and property from one place, State and country, to another, is an absolute necessity. It is difficult to perceive how the power to fix and regulate the charges for such transportation can be considered in any other light than that of a power to regulate commerce, and when the railroad upon which the transportation is made passes through more States than one, or from one State into another, it does constitute commerce among the States, and the States have not the power to regulate.

As already stated, the Chicago, St. Louis & New Orleans Railroad was designed to be and was chartered by the legislatures of Louisiana, Mississippi, Tennessee and Kentucky, though all acting separately, it is true, but with one common purpose, which was to constitute one corporate body for the maintenance of a great commercial highway for transportation from New Orleans to Cairo, and there to connect with all the commercial highways connecting at that point. It is not, therefore, a mere local highway, although, as an incident, freight and passengers were intended to be and are transported from one place to another in the same State, as is done by means of vessels, on navigable streams passing by or through more States than one, in respect to which the Supreme Court of the United States has decided, in the case where the transportation was of a person from New Orleans to Hermitage, in the State of Louisiana, that it was a commerce within the exclusive control of Congress, and for the reason that the vessel was engaged in the transportation of passengers on the Mississippi river between New Orleans, in Louisiana, and Vicksburg, in this State, and that an act of the legislature of Louisiana, attempting to control the carrying of passengers on steamboats in that State, was a violation of the provisions of the Constitution of the United States conferring upon Congress the power to regulate commerce among the States. See *Hall v. De Cuir*, 95 U. S. 485. In the case of *Ex parte Boyer*, 109 U. S. 629; s. c. 3 Sup. Ct. Rep. 434, the same court decided that a canal, constructed wholly in one State and by that State, but forming part of a line of transportation passing through more States than one, or from one State into another, is within the admiralty jurisdiction, and it would follow that inter-State commerce conducted on it is under the exclusive control of Congress.

It is argued upon the part of defendants that there is a distinction between water or a natural highway and an artificial one; but the canal is an artificial way, and it is difficult to find a reason for a distinction between the water on which the canal boat or other vessel floats and the iron rails over which the cars pass in transporting the same character of persons and property.

I do not suppose it can be seriously questioned that the original act as passed by the legislature violated the provisions of the Federal Constitution under consideration, and the legislature seems to have recognized that fact, and therefore, in the effort to avoid the result, passed a supplemental act confining its operations to persons and property transported from one place to another within the State, and to persons and freight transported from a place without the State to a place within the State, and from a place within the State to a place without the State.

The cases of *Munn v. Illinois*, 94 U. S. 113; *Chicago, B. & Q. R. Co. v. Iowa*, *id.* 155; and *Peik v. Chicago & N. W. R. Co.*, *id.*

164, are relied upon to sustain the validity of the act as it now stands. The first-named case was in relation to a warehouse situated wholly in Illinois, and does not, in my opinion, apply to the question under consideration. In the second case, the railroad about which the controversy arose was wholly within the State of Iowa. The last case, at first view, would seem to sustain the position assumed by counsel. But it cannot fairly be supposed that the court intended to declare that inter-State commerce might be regulated by the States until Congress chose to regulate it, for the same court has often said that inaction by Congress in this respect is no warrant for State interference. The opinion is not as intelligible as perhaps it might have been made by a fuller statement of the facts. It was a peculiar case. A corporation of Illinois was, by the consent of that State, merged into a corporation of the State of Wisconsin, and in express terms was thereafter to be governed by the laws of Wisconsin, within that State, and the constitution of Wisconsin authorized the legislation complained of, and the corporation had become a domestic corporation of Wisconsin, although its line of road extended into the State of Illinois. The court said that Wisconsin could certainly regulate its fares, and that such regulation affected people outside the State only incidentally. In any event we have not such a case before us in the striking particulars presented, to wit, a case where one State had the power to regulate rates on a road extending beyond its limits. It will be observed that the court throughout treats the corporation as a domestic corporation under the power of Wisconsin throughout its line of road. The language of the court is: "Thus Wisconsin is permitted to legislate for the consolidated company in that State precisely the same as it would of its own original companies if no consolidation had taken place." It is sufficient to say, without expressing an opinion how far this peculiar condition of the corporation ought to modify the rule as to commercial power, that there is no such case presented here, and that the question before the court in this case is an open one, so far as it relates to this court.

The question, however, has been passed upon by Judge McCrary, of the United States Circuit Court of Iowa, in the case of *Kaiser v. Illinois Cent. R. Co.*; s. c., 16 Am. & Eng. R. R. Cas. 40, in which that distinguished judge held that a statute of Iowa fixing the maximum rate to be charged by railroad companies for carrying freight within the State is invalid in so far as, by its terms, it applies to through shipments, from points within the State to points without the State, because it is a regulation of commerce beyond the State, and, if upheld, would enable the State to discriminate against other States.

It will be observed that the constitutions of Illinois, Iowa and Wisconsin, in which the cases relied upon by defendants' counsel

arose, reserved the right to the legislatures, respectively, to fix maximum or regulate the rates of charges for transportation within the respective States, which is a right not reserved by the constitution of this State. The rule held by Judge McCrary is the same recently announced by Judges Baxter, Key and Hammond, in the case recently decided at Nashville, Tennessee. *Louisville & N. R. Co. v. Railroad Com'rs of Tenn.*, 16 Am. & Eng. R. R. Cas. 1. Other decisions by eminent circuit judges, going to sustain the same position, might be referred to, but being satisfied that the rule stated is the law, I adopt it, and, applying it to the act of the legislature complained of in the bill, hold it to be in conflict with the Constitution of the United States, and void. This being so, other questions raised in the bill need not be considered, as it would extend this opinion to too great a length.

The result is that the motion of the complainant must be sustained, and a writ of injunction awarded, as prayed for in the bill.

Upon final hearing the following opinion was filed:

HILL, J.—This bill is filed against the defendants, John M. Stone, W. B. Augustus and William McWillie, as railroad commissioners of this State, to enjoin and restrain them from in any way interfering with the Mobile & Ohio Railroad Company, its officers, agents or employes, in the management of the business of said railroad, or the property and business of said corporation, and to prevent the officers of said railroad from obeying any orders issued or made by the railroad commission, etc.

The questions presented have been most forcibly and exhaustively argued by the distinguished and learned counsel on both sides, and are questions of grave importance to the people and the commercial interests of the country generally, as well as to the complainant and all whose interest it represents or to be affected by the result hereof.

The questions now to be decided arise upon complainant's motion for the issuance of the writ of injunction prayed for in the bill above stated.

The facts stated in the bill not being disputed, will be considered as true in considering this motion, and of which the following is a brief statement so far as it relates to the present motion. In the year 1848 the Legislatures of the States of Alabama, Mississippi, Tennessee and Kentucky, acting separately, but with a common purpose, by their several acts of incorporation incorporated the Mobile & Ohio Railroad Company, the purpose of which was to construct, equip and operate a railroad to extend from Mobile in Alabama to a point opposite Cairo, in the State of Illinois, at the junction of the Mississippi and Ohio rivers, so as to connect with the channels of commerce at each end of this limit with all those

at intermediate points, thus creating a great national highway for the transportation of persons and property, not only from the one point to the other and intermediate points, but with other States and the markets of the world, one channel of commerce being connected with another as links in chains of commercial transportation to an unlimited extent. To promote this grand scheme the United States granted to the corporation many thousands of acres of its lands situate in the States of Alabama and Mississippi, owning no lands in the other States through which this railroad was located. The corporation was further aided by the States and counties and citizens along the line of the road by contributions of money, labor and otherwise, by which means the railroad has been completed, equipped, and has been operated for many years without any interruption by any State legislation until within a short time.

That as a consideration upon which said land was granted by the United States, certain rights were reserved by the Government in relation to the transportation of the mails, property and men belonging to or employed by the United States.

The corporation, being in need of money, has given a trust deed to complainant as trustee therein to secure certain bonds, upon which it has raised the needed funds for the purpose of discharging its other indebtedness and for the better equipping and operating said railroad.

The bill further states that the acts of incorporation conferred upon this corporation, among other powers, the right to elect its own officers, and to do and perform all acts necessary to the building, equipping and operating said railroad, and especially the right from time to time to fix, regulate and receive the tolls and charges by them to be received for the transportation of persons and property on said railroad constructed or to be constructed. The bill further states and charges that on the 11th day of March last, the legislature of this State passed an act which has been approved by the Governor of the State, entitled, "An act to provide for the regulation of freight and passengers on railroads in this State, and to create a commission to supervise the same, and for other purposes." That under the provisions of this act of the legislature, the defendants have been appointed and commissioned as commissioners, and are now proceeding to exercise the powers and to discharge the duties imposed and prescribed in said act. If permitted so to do, so far as it relates to the Mobile & Ohio Railroad, it will greatly interfere with and embarrass the business and management of said company and its railroad, and the interests of all concerned therein; that such interference if permitted will impair important and essential rights which have been vested in said corporation by the charter of said company, which formed and constitutes a contract between the State of Mississippi, which

granted and the company which accepted said charter, and which contract is protected and inviolate by the provisions of the 10th section of the 1st article of the Constitution of the United States.

The provisions contained in the 6th section of the act complained of are mainly relied upon as impairing the contract so made and violating the rights so secured. This section is as follows: "That it shall be the duty of all persons or corporations who shall own or operate a railroad in this State, within thirty days after the passage of this act, to furnish the commission with its tariff of charges for transportation of every kind, and it shall be the duty of said commission to revise said tariff of charges so furnished, and to determine whether or not, and in what particular, if any, are more than just compensation for the services to be rendered, and whether or not unjust discrimination has been made in such tariff of charges against any person, locality or corporation, and when said charges are corrected or approved by said commission, the commission shall then append a certificate of its approval to said tariff of charges, but in revising or establishing any and every tariff of charges, it shall be the duty of said commission to consider the character and nature of the service to be performed, and the entire business of such railroad, together with its earnings of passengers and other traffic, and shall so revise such tariffs as to allow a fair and just return on the value of such railroad, appurtenances and equipments; and it shall be the duty of said commission to exercise a careful and watchful supervision over such tariff of charges, and alter such tariff of charges from time to time as justice to the public and each of such railroad companies require, and to increase or reduce any of said rates according as experience and business operations may show to be just; and said commission shall accordingly fix tariffs of charges for railroads failing to furnish tariffs as above required; and it shall be the duty of said railroad companies or persons operating railroads in this State to post at its depot all rates, schedules and tariffs for the transportation of passengers and freight made or approved by said railroad commission with said certificate of approval within ten days after said approval, in some conspicuous place at said depot; and it shall be unlawful for any such person or corporation to make any rebate or reduction from such tariff in favor of any person, locality or corporation which shall not be made in favor of all other persons, localities or corporations by a change in said published rates allowed by the commission, and when any change is contemplated to be made in the schedule of passenger or freight rates of any railroad by the commission, said commission shall give the person or corporation managing said railroad notice in writing, at least ten days before such change, of the time and place at which such change will be considered."

These and other sections in the act imposing other duties upon said commission in relation to the control of said railroads, and imposing upon the persons and corporations managing them penalties for violating the provisions of said act of the legislature, and which it is alleged violates and impairs the contract so made between the legislature and corporation by the charter, aforesaid, as well as in violation and in conflict with other provisions of the Constitution of the United States and of the constitution of this State; but the section above quoted is sufficient to present the question to be decided upon this motion. It is not necessary to refer to adjudicated cases by the Supreme Court of the United States to maintain the well-settled rule that courts will not declare legislative enactments void by reason of their repugnance to the constitutions, State or Federal, except when the judicial mind is so convinced it is the duty of the court to declare the legislation void.

The court has no jurisdiction to determine the wisdom or unwisdom of the act in question; if unwise, the legislature alone can grant relief.

The only question which the court can decide is: Did the legislature have the power to pass the act? or in other words, did any inhibition against such power exist under any provision of the Federal or State constitution? If none such existed, the act must be maintained; but if such did exist, it must be declared void so far as it relates to the Mobile & Ohio Railroad Company, and the property and interest of all persons connected therewith.

The question to be determined is: Did the act of incorporation passed by the legislature of Alabama and adopted by the State of Mississippi, in relation to the point under consideration which is as follows: "And be it further enacted, that it shall be lawful for the company hereby incorporated from time to time to fix, regulate and receive the toll and charges by them to be received for transportation of persons or property on their railroad or way aforesaid hereby authorized to be constructed, erected, built or used, or upon any part thereof," create a valid and binding contract between the State and the corporation, and which the legislature is inhibited by the provision of the 10th section of article 1 of the Federal Constitution from changing or impairing, without the consent of the corporation or those holding under it. That the rights, powers and franchises granted by the legislature to corporators by the charter creating them, and which are accepted by those to whom they are granted, are contracts within the meaning of the constitution, was settled by the Supreme Court of the United States in the Dartmouth College case, and has been repeatedly recognized by that court from that time to the present, and is the main pillar upon which corporate rights must rest for security; and it is not to be presumed that the court at least will

depart from a rule so well settled as long as the constitutional rights are maintained.

The charter, being the contract between the parties to it, must be taken with all its conditions, restrictions and limitations. The legislature has the right in granting it to reserve the right to change, modify or repeal it or any provisions in it; or if it contains any provisions within the police power of the State, or power from which the legislature is not at liberty to part, being such matters as affect the public peace, public health, public morals, public convenience and the like, the legislature may at will revoke rights and powers conferred or may limit and contract them. Those accepting corporate rights take them subject to this power upon the part of the legislature.

In construing contracts we must ascertain, if we can, the intention of the parties to them, and in doing so we must look to the objects for which they were made and in the light of the surrounding circumstances. One important if not the main object upon the part of the stockholders was to obtain a return by way of dividends for the investment made, and upon the part of the United States and counties, the main purpose was the establishment of a reasonably safe and rapid mode of transportation of persons and property from one end of the line to be constructed to the other, with all its connections. These being the principal objects of the parties to the contract on the one side, it is not probable that the charter would have been accepted with the understanding that the legislature of any one of the States could at pleasure place any restrictions or limitations upon the rights and powers conferred, and which were not reserved in the act of incorporation.

The right upon the part of the company to charge and receive compensation for services to be rendered, if taken away or impaired, would defeat the purpose of the contract.

This right to fix the charges for compensation certainly does not fall within any police power of the States. The next question is: To whom was it given by the contract in the charter? Most clearly to the company, without any restriction or reservation.

It is contended on the part of the defendants that this power was not given; that the words of the charter that it shall be lawful for the company, without any restriction or reservation, to fix the amount to be received, and that these words were unnecessary. I am of the opinion that, by the language used, it was understood by both parties as conferring the power and authority to fix the charges. I am further satisfied that the right and power granted by the charter created a contract upon the part of the State which it could not change, repeal or modify without the consent of the other parties to it, and any attempt so to do on the part of the State must be held, under the provisions of the constitution referred

to, null and void, so far as it relates to the question under consideration. If the company by its officers has the power to fix its tariff of charges, the commission cannot fix a rate of charges different from that fixed by the company, which will be obligatory upon the company. It is clear that the legislature intended to give such power to the commission, and imposes severe penalties upon the corporation and its officers for demanding or receiving different rates than those fixed by the commission, and for other violations of the act.

With the conclusion thus reached I might dismiss the subject without further comment, but it has been pressed with great force and ability on the one side and with equal ability resisted on the other,—that this act of the legislature is in conflict with and violates the 8th section of the 1st article of the Constitution of the United States, because, in purpose and effect, it is a regulation of commerce among the States, which right is exclusively vested, by this provision of the Federal constitution, in the Congress of the United States. This is a pregnant and important question, in which all concerned are deeply interested.

As already stated, the right to demand and receive compensation for the expense incurred in building, equipping and operating this wonderful and immense avenue and mode of transportation of commerce from one place, State and county, to another, is an absolute necessity; it is difficult to see how the right to fix and regulate the charges for the transportation of persons and freight can be considered in any other light than a regulation of commerce, and that, when the railroad passes through more States than one, and the transportation passes from one State to another, or through more than one State, it does constitute commerce among the States and deprives the States of the power to regulate it. As already stated, the Mobile & Ohio Railroad was designed to be and was chartered by the legislatures of Alabama, Mississippi, Tennessee, and Kentucky, all acting separately to be sure, but with one common purpose, and that was to constitute one corporate body for the maintenance of a great commercial highway of communication and transportation from Mobile, Ala., to Cairo, Ill., and thence to connect with all the commercial highways converging at those points. It is not, therefore, a mere local highway, although, as an incident, freight and passengers were intended to be and are transported from one place to another in the same State, as do vessels on the navigable streams; and in that case the Supreme Court of the United States decided that in the transportation of a person from New Orleans to Hermitage, in the State of Louisiana, upon the Mississippi river, the latter place being the point of destination, was commerce within the exclusive control of Congress, for the reason that the vessel was engaged in the transportation of passengers between New Orleans in Louisiana and

Vicksburg in this State, and that an act of the legislature of Louisiana attempting to so control carrying of passengers in steamboats was a violation of the provisions of the Constitution of the United States conferring upon Congress the power to regulate commerce among the States. *Hall v. De Cuir*, 95 U. S. 485. The reason given is that the points of destination of this line of transportation were in different States. The cases of *Munn v. Illinois*; *Chicago, Burlington & Quincy R. R. Co. v. Iowa*, and *Peik v. the Chicago & Northwestern R. R. Co.*, in 4th Otto, are relied upon to sustain the validity of the act as to the latter class of cases.

The first-named case was in relation to warehouses situated in Illinois, and does not, in my opinion, apply to the question under consideration. In the second case the railroad about which the controversy arose was wholly within the State of Iowa.

The last case at first view would seem to sustain the position assumed by counsel, but when examined will be found only to apply to such commerce as is of domestic concern, and to transportation within the State, and that carried without the State of Wisconsin, but controlled by the laws of that State, the constitution of which reserves to that State the power to alter or repeal the laws in relation to railroad companies. It is admitted in the opinion in that case that Congress may pass laws to regulate the last-named transportation, but until Congress acts, the State of Wisconsin may pass laws regulating commerce over this particular road. In the case under consideration, neither the constitution of the State of Mississippi nor the charter of the Mobile & Ohio Railroad Company reserved any power to legislate in relation to this or any other railroad company.

I am, therefore, of opinion that the ruling of the supreme court in the last-named case does not apply to the case before the court, and that the question before the court upon this point is an open one so far as it relates to this court.

The question has been passed upon by Judge McCrary in the Circuit Court in Iowa, in the case of *Kaiser v. Illinois Central R. R. Co.*, in which that distinguished judge held, that a statute of Iowa fixing the maximum rate to be charged by railroad companies for carrying freight within the State is invalid, in so far as by its terms it applies to through shipments from points within the State to points without the State, because it is a regulation of commerce beyond the State, and if upheld would enable the State to discriminate against other States.

In the recent case decided at Nashville by Judges Baxter, Hammond and Key, 16 Am. & Eng. R. R. Cas. 1, Judge Hammond, delivering the opinion on this question, which was assented to by the other judges, holds the same rule.

Other decisions might be referred to going to sustain the same rule, but being satisfied that the rule stated is the law, I adopt it,

and under the operation of which the act of the legislature complained of in the bill must be held in conflict with the Constitution of the United States and void.

I am, therefore, brought to the conclusion that for the reasons stated, if for no other, so far as this act of the legislature authorizes and requires the commission to fix a tariff of charges, and to be enforced against the Mobile & Ohio Railroad Company, it must be declared null and void.

The commission having no power to fix and regulate the tariff of charges for the Mobile & Ohio Railroad Company, the provisions of the act in relation to other powers and duties to be performed on the part of the commission, so far as they relate to that corporation, must also be declared void.

The other objections to this act of the legislature raised and argued by counsel, not being necessary to be considered upon the present motion, will be postponed until the hearing of the cause.

State Laws Regulating Freights and Fares.—As to the constitutionality of such laws, see note to *Hardy v. Atchison, T. & S. F. R. Co.*, *infra*, containing full list of authorities.

HARDY

v.

ATCHISON, TOPEKA & SANTA FE R. CO.

(*Advance Case, Kansas, November 28, 1884.*)

Under Art. 1, Sec. 8 of the Constitution of the United States, the power of Congress to regulate commerce among the States—inter-State commerce—which consists, among other things, in the transportation of goods from one State to another, is exclusive.

The fact that Congress has not seen fit to prescribe any specific rules to control or regulate the transportation of goods from a place in one State to a place in another—inter-State commerce—does not empower the States of the Union to regulate such commerce. Its inaction on the subject, when considered with reference to its other legislation, is equivalent to a declaration that inter-State commerce shall be free and untrammelled.

Sec. 57, Chap. 28, Comp. Laws of Kansas, 1878, known as the "Maximum Freight Rate Law" of 1868, had no application to fix or limit the charges for transportation of freight from another State into this State, because if it was intended to apply to such inter-State commerce, it was in violation of Art. 1, Sec. 8 of the Constitution of the United States, and therefore void.

ERROR from Reno county District Court. The opinion of the court sufficiently states the case.

James McKinstry, for plaintiff in error.

A. A. Hurd, Robert Dunlap and John Reid, for defendant in error.

HORTON, C. J.—It appears from the agreed statement of facts that while the Maximum Freight Rate Law of 1868 was in force in this State, the goods and merchandise mentioned in plaintiff's bill of particulars were shipped from St. Louis, Mo., under a contract made there for transporting the same from St. Louis, Mo., to Hutchinson, Kans., upon the usual through rates charged upon such class of goods; that on the shipments of the goods only one receipt or bill of lading was issued to the plaintiff; that the through rate for the freight charged and collected was in every instance the same as charged by mutual arrangements of all the railroads connecting with the defendant's railroad for similar shipments from St. Louis to Hutchinson; that in the division of the freight among the railroad companies transporting the goods, the Atchison, Topeka & Santa Fe Railroad Company received an amount thereof in excess of its ordinary local freight rates, and an amount in excess of that authorized by the Maximum Freight Rate Law of Kansas at that time in force. Sec. 57, Chap. 23, Comp. Laws of 1879.

Plaintiff claims to recover the alleged overcharges paid by him for the transportation of his goods. It is admitted, if he is entitled to recover anything, he shall recover an amount equal to that received by the defendant or its proportion of the through rate on the shipments, less the amount of its local rates from the point where the goods and merchandise were delivered to it by the connecting line to Hutchinson.

On the part of the railroad company it is contended that Sec. 57, Chap. 23, Comp. Laws of 1879, had no application to the transportation of freight from another State into this State.

Sec. 57 is as follows: "Every such railway shall arrange and classify all property usually carried by them over their roads, and shall affix thereto the rates respectively at which the same shall be transported between the several stations, or points of connection or intersection of other roads, which rate shall be per one hundred pounds, and shall not exceed, for distance less than fifty miles, twenty cents per ton per mile, fifteen cents per ton for second class, and ten cents per mile per ton for third class articles; for distances of fifty miles and over, but less than one hundred miles, fifteen cents per ton per mile for second class, and seven cents per mile for third class articles; for distances of one hundred miles or more, ten cents per mile per ton for first class, eight cents per ton per mile for second class, and five cents per ton per mile for third or other classes."

The contention is, that any statute fixing or limiting the charges for transportation of goods from a place in one State to a place in another is an attempt to regulate commerce between the States, and that such a statute is invalid as a regulation of inter-State commerce. In support of this it is asserted that the exclusive right to regulate inter-State commerce is expressly confided by the

Constitution of the United States to Congress by Art. 1, Sec. 8, which declares, that "the Congress shall have power * * * to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

The Federal courts have established that the transportation of merchandise from place to place by railroad is commerce; that the transportation of merchandise from a place in one State to a place in another is commerce among the States, or inter-State commerce; that to fix or limit the charges for such transportation is to regulate commerce; that a statute fixing or limiting such charges for transportation from places in one State to places in another is a regulation of commerce among the States; that the power to regulate such commerce is vested by the Constitution of the United States in Congress. *Keiser v. Ill. Cent. R. Co.*, 16 Am. & Eng. R. Cas. 40; *Louisville & N. R. Co. v. Railroad Com. of Tenn.*, *id.* 1; *Carton v. Ill. Cent. R. Co.*, 59 Iowa, 148; 6 Am. & Eng. Cas. 317, and the authorities there cited.

The debatable question is, how far this power is concurrent. May a State act until its legislation is superseded or interfered with by Congress? In other words, may Kansas control or regulate, within its limits, the charges for transportation of goods shipped from another State, under a contract made in that State, to a place in this State? We suppose it will be conceded that Kansas can pass no law which seeks to fix or limit the charges for the carriage of goods over the lines of its railroads which pass over its territory, but neither originate nor terminate within it, as, for instance, goods passing from Missouri to Colorado, Texas or New Mexico. We suppose it will be conceded also that it is beyond the power of Kansas to fix the whole charge for the carriage of goods from a point in the State to a point in another. This would be an attempt to give our laws an extra-territorial force. If, however, the power of Congress to regulate commerce among the States—inter-State commerce—which consists, among other things, in the carriage of persons and the transportation of goods from one State to another, is exclusive, then Sec. 57 could not fix or limit the charges in controversy. This question is one upon which the decisions of the Supreme Court of the United States are final. We shall therefore refer to the more important of those adjudications.

In *Crandall v. State of Nevada*, 6 Wall. 35, a statute of Nevada, which in effect laid a tax upon every traveler passing through or beyond its territorial limits, was adjudged to be invalid, but not on the ground that it was a regulation of inter-State commerce. Chief Justice Chase and Mr. Justice Clifford dissented from this conclusion, and pronounced the act to be a regulation of inter-State commerce exclusively within the jurisdiction of Congress.

In the case of the State Freight Tax, 15 Wall. 232, a statute of

Pennsylvania, which in effect laid a tax upon all freight taken up within the State and carried out of it, or taken up without and brought within it by any railway, was adjudged to be void. The decision was placed solely upon the ground that the law was a regulation of commerce among the States and was invalid, although Congress had never legislated in reference to the same subject-matter. Mr. Justice Strong, in delivering the opinion, said: "The tax upon freight transported from State to State is a regulation of inter-State transportation, and therefore a regulation of commerce among the States. It is a rule prescribed for the transporter by which he is to be controlled in bringing the subjects of commerce into a State and in taking them out. * * * If, then, this is the tax upon freight carried between States and a tax, because of its transportation, and if such tax is in effect a regulation of inter-State commerce, the conclusion seems to be inevitable that it is in conflict with the Constitution of the United States. It is not necessary to the present case to go at large into the much debated question, whether the power given to Congress by the constitution to regulate commerce among the States is exclusive. In the earlier decisions of this court, it was stated to have been so entirely vested in Congress that no part of it can be exercised by a State. It has no doubt often been argued and sometimes intimated by the court that so far as Congress had not legislated on the subject, the States may legislate respecting inter-State commerce; yet if they can, why may they not add regulations to commerce with foreign nations beyond those made by Congress, if not inconsistent with them? For the power over both foreign and inter-State commerce is conferred upon the Federal legislature by the same words, and certainly it has never yet been decided by this court that the power to regulate inter-State as well as foreign commerce is not exclusively in Congress. * * * Inter-State transportation of passengers is beyond the reach of a State legislature. * * * Merchandise is a subject of commerce; transportation is essential to commerce; and every burden laid upon it is, *pro tanto*, a restriction. Whatever therefore may be the true doctrine respecting the exclusiveness of the power vested in Congress to regulate commerce among the States, we regard it as established that no State can impose a tax upon freight transported from State to State, or upon the transporter because of such transportation."

In *Welton v. State of Missouri*, 91 U. S. 275, Mr. Justice Field said: "It will not be denied that that portion of commerce with foreign countries and between the States which consists in the transportation and exchange of commodities is of national importance, and admits and requires uniformity of regulation. The very object of investing this power in the general government was to insure this uniformity against discriminating State legislation. * * * The fact that Congress has not seen fit to prescribe any

specific rules to govern inter-State commerce does not affect the question. Its inaction on this subject, when considered with reference to its legislation with respect to foreign commerce, is equivalent to a declaration that inter-State commerce shall be free and untrammelled."

In *Railroad Co. v. Husen*, 95 U. S. 465, Mr. Justice Strong said: "Whatever may be the power of a State over commerce that is completely internal, it can no more prohibit or regulate that which is inter-State than that which is with foreign nations. Power over one is given by the Constitution of the United States to Congress in the same words in which it is given over the other, and in both cases it is necessarily exclusive. That the transportation of property from one State to another is a branch of inter-State commerce is undeniable, and no attempt has been made in this case to deny it. * * * This court has heretofore stated that inter-State transportation of passengers is beyond the reach of a State legislature, and if, as we have held, State taxation of persons passing from one State to another, or a State tax upon inter-State transportation of passengers, is prohibited by the constitution because a burden upon it, *a fortiori*, if possible, is a State tax upon the carriage of merchandise from State to State. Transportation is essential to commerce, or rather it is commerce itself, and every obstacle to it, or burden laid upon it by legislative authority, is regulation."

In *Hall v. DeCuir*, 95 U. S. 485, Chief Justice Waite said: "We think it may safely be said that State legislation which seeks to impose a direct burden upon inter-State commerce, or to interfere directly with its freedom, does encroach upon the exclusive power of Congress. * * * If each State was at liberty to regulate the conduct of carriers while within its jurisdiction, the confusion likely to follow could not but be productive of great inconvenience and unnecessary hardship. Each State could provide for its own passengers and regulate the transportation of its own freight, regardless of the interest of others. Nay, more, it could prescribe rules by which a carrier must be governed within the State in respect to passengers and property brought from without. On one side of the river or its tributaries he might be required to observe one set of rules, and on the other another. Commerce cannot flourish in the midst of such embarrassments."

In *Telegraph Co. v. Texas*, 105 U. S. 460, Chief Justice Waite said: "A telegraph company occupies the same relation to commerce as a carrier of messages that a railroad company does as a carrier of goods. Both companies are instruments of commerce, and their business is commerce itself. * * * A specific tax on each message, so far as it operates on private messages sent out of the State, is a regulation of foreign and inter-State commerce and beyond the power of the State."

In *Steamship Co. v. Board of Railroad Commissioners*, 18 Fed. Rep. 10, Mr. Justice Field said: "It was at one time a subject of much discussion and some disagreement among judges whether the power conferred upon Congress to regulate commerce is exclusive in its character, or concurrent with that of the States. By recent decisions, this question has been put at rest. When the subject upon which Congress can act under this power is national in its character, and admits and requires uniformity of regulation affecting alike all the States, then the power is in its nature exclusive; but when the subject upon which the power is to act is local in its operation, then the power of the State is so far concurrent that its action is permissible until Congress interferes and takes control of the subject. Of the former class is all that portion of commerce with foreign countries and among the States which consists in the carriage of persons and the transportation, purchase, sale and exchange of commodities. From necessity there can be but one rule in such cases for all the States, and the only power competent to prescribe a uniform rule is one which can act for the whole country. Its inaction in such cases is therefore an equivalent to a declaration that such commerce shall be free from State interference." See also *Pullman Southern Car Co. v. Nolan*, 17 Am. & Eng. R. R. Cas.; *Gibbons v. Ogden*, 9 Wheat. 1; *The Daniel Ball*, 10 Wall. 565; *City of Council Bluffs v. Railroad Co.*, 45 Iowa, 338; *Passenger cases*, 7 How. 283; *State of Penn. v. Wheeling Bridge Co.*, 18 *Id.* 481; *Cooley v. Board of Wardens*, 12 *Id.* 299; *Gilman v. Philadelphia*, 3 Wall. 713.

From these authorities and the cases therein cited we think it is conclusively settled that the portion of either inter-State or foreign commerce which consists in transit or traffic, including transportation in all forms, by land or by water, and the purchase, sale or exchange of goods, is national and susceptible of a uniform plan of regulation, and is therefore under the exclusive control of Congress. Even if Congress has not seen fit to prescribe any specific rules to govern inter-State commerce, that does not affect the question. "Its inaction on this subject, when considered with reference to its legislation with respect to foreign commerce, is equivalent to a declaration that inter-State commerce shall be free and untrammelled." *State v. Saunders*, 19 Kans. 127; *Welton v. State of Missouri*, *supra*.

Our opinion is therefore that Sec. 57, which was repealed by the legislature in 1883, if intended to apply to inter-State commerce, was in violation of the Constitution of the United States, and therefore void.

The conclusion we have reached could not be disputed were it not for the case of *Peik v. Chicago & N. W. R. Co.*, 94 U. S., 164, and the language of the court in *State v. Munn*, *Id.* 133; and *Railroad Co. v. Iowa*, *Id.* 155. We confess it is difficult to recon-

cile these three cases with the principles which have been settled by the prior and subsequent course of decision of the United States Supreme Court, if they decide that until Congress acts in reference to inter-State commerce, the legislature of a State may regulate the transportation of freight and passengers among the States. These cases were decided in 1876, and the opinion in the Peik case was delivered by Chief Justice Waite; yet in the case of *Hall v. DeCuir*, *supra*, decided the next year, 1877, the Chief Justice quotes approvingly what was said by Mr. Justice Field, speaking for the court in *Welton v. State of Missouri*, 91 U. S., 282, that "inaction (by Congress) * * * is equivalent to a declaration that inter-State commerce shall remain free and untrammelled." Referring to those decisions, the Supreme Court of Iowa in *Carton v. Railroad Co.*, *supra*, uses the following language: "The cases of *State v. Munn*, 94 U. S. 113; *Railroad Co. v. Iowa*, *Id.* 155; and *Peik v. C. & N. W. R. Co.*, *Id.* 164, do not appear to us to sanction the validity of acts of the State legislature regulating the transportation of freight and passengers between the States. They merely determine the power of the statutes to fix reasonable warehouse charges and reasonable charges for transportation of freight within the boundaries of the States respectively, and that when such power is exercised, although it may incidentally affect commerce between the States, yet the laws of the States are not regulations of inter-State commerce because of such incidental results. That it was not intended in those cases to approve legislation like that under consideration in this case, it appears to us, is conclusively shown by the reasoning in the latter cases of *Hall v. DeCuir*, 95 U. S. 485; and *Railroad Co. v. Husen*, *Id.* 465.

In the case of *L. & N. R. Co. v. R. Com. of Tenn.*, *supra*, Hammond, J., in commenting upon the Peik case, says: "In the Wisconsin case, the next in the series of the Granger cases, the court mainly deals again with what were evidently considered by all more important questions. Circuit Judge Drummond tells us that question was scarcely argued at all in the court below, and evidently it was only incidentally considered in the supreme court. 6 Biss. 177. The Wisconsin act, unlike ours, contained an exception which excluded from its operation all rates of charges for "carrying freight which comes from beyond the boundaries of the State and to be carried across or through the State." Possibly, notwithstanding its terms, the act may have been construed within the purview of this exception, not to apply to persons and property coming from other States into Wisconsin or going from that into other States, which was not thought, however, to be its construction in the court below, though the question whether it could so apply under the State Freight Tax cases, 15 Wall. 232, was reserved and not decided in that court."

In the Peik case the Chief Justice speaks of the power of Wisconsin to regulate its fares, etc., so far as they are a domestic concern, even though incidentally they may reach beyond the State. Clearly a statute of the State prescribing rates of freight for goods, which shall be binding upon the railroad companies with respect to goods brought from another State, is a regulation of inter-State commerce as much as a law imposing a tax upon such goods. Therefore it cannot be said that such a statute acts incidentally. It acts directly upon a commerce which is inter-State. It does not, like laws imposing a tax upon gross receipts from traffic, affect such commerce indirectly. It assumes to regulate and control it as commerce, and has no other object and design. Therefore we cannot say, as was stated in the Peik case, that said section 57, is intended to apply to inter-State commerce, merely incidentally affected such commerce.

We have examined the case of the People v. W., St. L. & P. R. Co., 104 Ill. 476; s. c., 12 Am. & Eng. R. R. Cas. 10. That portion of the case that is in any way applicable to this is largely based upon the construction given by that court to the three cases cited, and reported in 94 U. S. Rep. For the reasons before stated, we think the Supreme Court of the United States never intended to establish the doctrine as broadly as contended in the Illinois case.

Thus far we have discussed the question presented as though Congress had remained entirely passive upon the subject. Such, however, is not the fact. In 1866 it passed an act authorizing all railroad companies to transport passengers and freight from State to State, and empowering them to receive and accept compensation therefor. It seems to us that the existence of this statute must be considered in discussing the power of a State to regulate inter-State commerce. See U. S. Stat. at Large, vol. 14, 66; Rev. Stat. U. S. (2d ed., 1878), p. 1017, Sec. 5258.

If by this statute Congress undertook to legislate upon inter-State commerce, the exceptional decisions of the United States Supreme Court decided in 1876, including the Peik case, do not militate in the slightest degree against the views announced herein. That each railroad company in the case before us issued its own way-bill to and from the connecting point with the defendant, and that each company was liable for the loss and damage occurring on its own road only, does not affect the question of inter-State commerce. From the time the goods began to be moved from St. Louis, Mo., until they were delivered at Hutchinson, in this State, they were the subject of commerce and commerce among the States, and therefore inter-State commerce.

After a careful consideration of the whole record and the important questions involved, we decide that the plaintiff is not entitled to recover.

The judgment therefore of the district court must be affirmed.
All the justices concurring.

State Regulation of Railroads.—It is conclusively settled that a State law regulating the operation of railroads within the State is valid, notwithstanding the fact that it may indirectly affect inter-State commerce.

State Tax on Railway Gross Receipts, 15 Wall. 284; *Munn v. Illinois*, 94 U. S. 118; *Chicago, etc., R. R. Co. v. Iowa*, 94 U. S. 155; *Peik v. Chicago & N. W. R. Co.*, 94 U. S. 164.

In some cases such laws have been sustained as a valid exercise of the police power of the State. *Railroad Co. v. Fuller*, 17 Wall. 560; *Rae v. Grand Trunk R. Co.*, 9 Am. & Eng. R. R. Cas. 470; *Chicago & Alton R. Co. v. People*, 12 Am. & Eng. R. R. Cas. 156. But see *Hall v. DeCuir*, 95 U. S. 485.

When the main effort of the act is to regulate inter-State commerce, such act is of course invalid. *City of Council Bluffs v. Kansas City, St. J. & C. and B. R. R. Co.*, 45 Ill. 838; *Railroad Co. v. Huson*, 95 U. S. 465.

State Regulation of Railroad Freights and Fares.—The question has been frequently raised as to whether a State act regulating the rates of freight and fare is valid, when its effect is to regulate to a certain extent inter-State commerce. *McDuffe v. Portland & Rochester R. Co.*, 52 N. H. 520; *Messenger v. Pennsylvania R. Co.*, 86 N. J. L. 407; *Chicago & Alton R. Co. v. People, ex rel.*, etc., 67 Ill. 11.

In one case such acts were held valid and constitutional. *People v. Wabash etc., R. Co.*, 7 Am. & Eng. R. R. Cas. 628; s. c., 12 Am. & Eng. R. R. Cas. 10.

The weight of authority is, however, to the effect that such acts are not constitutional.

Carton & Co. v. Illinois Central R. R. Co., 6 Am. & Eng. R. R. Cas. 305; *Louisville & Nashville R. R. Co. v. Railroad Comm. of Tennessee*, 16 Am. & Eng. R. R. Cas. 1; *Kaliser v. Illinois Central R. R. Co.*, 16 Am. & Eng. R. R. Cas. 40, and note; *Illinois Central R. Co. v. Stone, et al.*, *supra*; *Hardy v. Atchison, T. & S. F. R. Co.*, *supra*; *Wells, Fargo & Co. v. Northern Pacific R. Co.*, *infra*.

When such law is clearly applicable only to transportation within the State, it is valid and constitutional. *Heiserman et al. v. Burlington, C. R. & N. R. Co.*, 16 Am. & Eng. R. R. Cas. 46.

Reagan Bill.—The passage of the late act by Congress, known as the "Reagan Bill," regulating the rates of freight and fare in cases of inter-State commerce, has a most important effect upon the question considered above. It is evident that Congress having now legislated upon the subject, there is now no possible room for State interference. There will therefore in the future be an end to litigation upon the point. It now remains to see how the "Reagan Bill" will be construed by the courts.

WELLS, FARGO & CO.

v.

NORTHERN PACIFIC RAILROAD CO.

(Advance Case, U. S. Circuit Court, District of Oregon, Nov. 19, 1884.)

A corporation, created in 1866, under a special law of Colorado, for the purpose of doing a general express business, is not prohibited by Sec. 1924 of the Revised Statutes from carrying on such business in Washington territory, although it may possess, as incidental to its general powers, some of the powers usually conferred upon banking corporations. Nor is such

corporation prevented from so carrying on its business in such territory by reason of Sec. 1889 of the Revised Statutes, which prohibits the legislative assemblies of the several territories from creating corporations except by general laws. The express business is an industrial pursuit within the meaning of such section.

Whether a railroad company, carrying on business in several States and territories, can refuse to an express company the facilities of its road for failure to comply with the laws of such States and territories concerning express companies, *quære*. If it can, the burden of proof is on the railroad to show a failure to comply with such laws.

Transportation is one of the essential elements of commerce, and a corporation engaged in inter-State transportation has a right to carry on such business unrestricted by any territorial or State restrictions.

In an application for a preliminary injunction, the court must decide and act according to the weight of evidence, when the evidence is conflicting. Such application should not be refused on the ground of delay, when such delay has not prejudiced the defendant.

Courts of equity have power to issue a preliminary mandatory injunction to compel a railroad company to furnish facilities over its road to an express company.

THIS cause came on to be heard on the bill and answer thereto, and the affidavits of plaintiff and defendant, upon motion for a preliminary injunction to compel the defendant to furnish the plaintiff express facilities over its lines of railway northward between Portland and Tacoma, and eastward between Wallula Junction and St. Paul. The opinion states the facts.

M. W. Fechheimer, for the plaintiff.

James McNaught and *C. B. Bellinger*, for the defendant.

DEADY, J.—This is a suit brought to restrain, or constrain, the defendant to furnish the plaintiff with express facilities upon its railway from Portland to Tacoma, and from Wallula Junction to St. Paul and branches between those points. It is brought by Wells, Fargo & Co., a corporation organized by a special act of the territory of Colorado in 1866, whereby it is authorized to engage in the express business, and to draw drafts and bills of exchange, or sell or buy the same in the course of such business. The act itself, Sec. 1. provides: "That Ben Holladay, David Street, Bela M. Hughes, S. L. M. Barlow and John E. Russell, and their associates, successors and assigns, be and they are hereby declared to be a body corporate and politic, by the name of Holladay Overland Mail & Express Company, and by such name shall have continual succession, with power to sue and be sued, plead and be impleaded, complain and defend in any court of law or equity; to adopt and use a common seal, and change the same; to purchase, hold, mortgage and convey any estate or property, real or personal, for the use and benefit of said corporation; to take, to hold and dispose of any mortgage on real or personal estate; to establish, maintain and operate any express, stage or passenger, or transportation route, or routes, by land or water, for

the conveyance of persons, mail or property of any kind, from, to and between any place or places in Colorado territory, and any place or places beyond the limits thereof; to erect, or hire and maintain warehouses or other structures for the safe keeping of goods, wares, merchandise or other chattels or effects, and the transaction of business; and for the purpose of facilitating exchange between the several places at which said corporation may transact business, the said company shall have power to draw, accept, indorse, guaranty, buy, sell and negotiate drafts and bills of exchange, inland and foreign; to receive coin, money, silver and gold, in any form or other, and any kind of valuables on deposit at its offices, and make orders for the payment and delivery of the same, or an equivalent, at any other place whatsoever; to buy, sell and dispose of gold and silver coin and bullion, gold dust, money, and securities for money, and to do a general exchange and collection business; and to invest surplus or unemployed funds in bonds or notes, secured by mortgage on real estate, stocks of the Government of the United States, of any of the United States, or otherwise, as the board of directors may designate."

The bill alleges that this plaintiff has been in the express business in Oregon, Washington, Idaho, Montana and places to the eastward thereof, for many years; that the defendant is furnishing express facilities to the plaintiff over its road from Kalama northward, and from Wallula Junction eastward to Missoula; but that it has refused, and still refuses, to furnish express facilities over its road to the plaintiff from Portland to Kalama and from Missoula eastward.

The answer of defendant substantially admits the facts upon which the plaintiff grounds its right; that is, the incorporation of the plaintiff, its express business, the ownership and operation of the Northern Pacific Railway and its branch lines by the defendant, and the refusal on the part of the defendant to furnish express facilities to the plaintiff within or between the points named. But, as a defence or reason for this refusal, the defendant sets up several matters. And first, it says plaintiff is a banking corporation, and by Sec. 1924 of the Revised Statutes it is prohibited from doing business in Washington territory, and therefore, as an express company, cannot come into that territory, nor can it rightfully or lawfully demand any privileges, or facilities, or conveniences, from the defendant over its railway lines within that territory.

Sec. 1924 of the Revised Statutes referred to is Sec. 6 of the act of March 2, 1853 (10 Stat. 172), organizing the territory of Washington, and it provides: "The legislative assembly of Washington shall have no power to incorporate a bank or any institution with banking powers, or to borrow money in the name of the territory,

or to pledge the faith of the people of the same for any loan whatever, directly or indirectly. No charter granting any privileges of making, issuing or putting into circulation any notes or bills in the likeness of bank notes, or any bonds, scrip, drafts, bills of exchange or obligations, or granting banking powers or privileges, shall be passed by the legislative assembly; nor shall the establishment of any branch or agency of any such corporation, derived from other authority, be allowed in the territory; nor shall the legislative assembly authorize the issue of any obligation, scrip or evidence of debt, by the territory, in any mode or manner whatever, except certificates for services to the territory."

In Rapalje & Lawrence's Law Dictionary, under the word "bank," occurs this definition of a bank: "(1) A place for the deposit of money; (2) an association or corporation whose business it is to receive money on deposit, cash checks or drafts, discount commercial paper, make loans, and issue promissory notes payable to bearer, called 'bank notes;' (3) the building, apartment or office where such business is transacted. Banks are of three kinds—banks of deposit, which include savings banks, and all others which receive money on deposit; banks of discount, being those which loan money on collateral or by means of discounts of commercial paper; and banks of circulation, which issue bank notes payable to bearer. But the same bank, generally, performs all these several operations."

Now, I think it is too plain for argument that the plaintiff is not a bank or a banking corporation in any of these senses, though it is undoubtedly true that it possesses some of the powers or faculties which may be used by a bank, and are commonly used by banks in the transaction of business; still, banking is not the object of its incorporation. The object of its incorporation is the transportation of packages, including money, from place to place, and, so far as money is concerned, this is also done at this day by telegraph, bills of exchange, drafts and otherwise. It may be very convenient and very proper for Wells, Fargo & Co. to receive \$1,000 in gold to be transmitted to New York, and to do so by giving a draft on New York, or by making a telegraphic transfer, and then transporting the coin to New York at its convenience, or keeping it here, if that should be more convenient, for the time being. I do not think I can better dispose of this objection than in the language of Mr. Justice Green in the able and exhaustive opinion (1884) delivered by him in the case between these same parties in Washington territory.

He says: "It has been stated in argument that plaintiff is doing a purely banking business at different points in the United States, notably at San Francisco and New York city. Possibly it may be doing what is beyond its lawful powers. The prime object of its pursuit, according to the charter, is not banking, nor the doing of

those things wherein banks and bankers are principally or peculiarly engaged, but the reception, transmission, and delivery of parcels and values, and executing other commissions. For a person whose proper vocation is not that of a banker, to do for himself, solely in furtherance of his own particular vocation, the things that a banker does, is not 'banking,' nor is it, as it seems to me, the exercise of 'banking powers.' If plaintiff, under its charter, does things that banks do, it does them as ancillary to its main business, just as a merchant incidentally, in his own behalf, in his mercantile transactions, may do every one of those things which plaintiff is empowered to do, and yet do them without being in name or fact an expressman or a banker. Not for the purpose of doing a banking business in any phase, but 'for the purpose of facilitating exchange between the several places at which said corporation may transact business,' are the particular powers of plaintiff given.

"For the safe and convenient transmission of value, and for no other purpose, a token of value is taken from a sender at one place and a corresponding token is produced to a recipient at another place. It is all the same as if a parcel of goods to be sent were received at one end of a line of transportation, and a like or equivalent parcel were, by consent or stipulation of the shipper, to be delivered at the other end. A business consisting of such details is not 'banking,' nor are powers limited to carry it on 'banking powers.' In one department or another of banking, the receiving of deposits or the buying and selling of gold and silver and mercantile paper and securities, or the drawing, paying and collecting mercantile paper, is the principal thing, and the exchange of values between localities, thereby sometimes effected, is subsidiary or accidental; but in this part of the express business, the principal thing is the transfer of value from place to place, and the buying, selling, drawing, paying, collecting, depositing and receiving are all accessory. Every milling, or mining, or other productive corporation, has to do some or all of these things for the convenience of itself in its own business, to a greater or less extent, and if it could not, would be cramped almost, or quite, to death. Between such a corporation and plaintiff there is a difference arising from the fact that the requirements of plaintiff's business make the doing of such things a matter of great convenience and frequency, and so prominent and important as to deserve special mention and definition in the charter. But in the particular now under discussion, the two are otherwise alike.

"I do not understand that Congress demands or contemplates that Sec. 1924 be so applied as to bar out from our territory any foreign corporations except those who carry on a business in which the things essential to banking are done for banking sake, or, in other words, as the main as distinct from an incidental and

ancillary affair. Only such are banks, or have the power to do banking. Wells, Fargo & Company is not, in my opinion, though it may be in its own, a corporation of that description. See *People v. R. R. & L. E. R. R. Co.*, 12 Mich. 384.

“ Looking further at this section, the intent of it seems to be, not to exclude a corporation, simply because so fortunate or unfortunate as to be clothed with banking powers, or powers used in banking, even so as to be exercised in chief, but rather to exclude one exercising or claiming to exercise them in fact. The section seems to be leveled, not at abstract or dormant power, but at actual deed or endeavor. In the record before me, there is nothing to show that plaintiff is doing or undertaking anything unlawful. It is not under compulsion of any absolute necessity of its express business to exercise the interdicted powers. Values can be expressed between distant places without traffic in precious metals or valuable paper. If such traffic be unlawful for plaintiff, it is freely, though perhaps not conveniently, separable from plaintiff's business. And although one may say that it is to be presumed that plaintiff is doing all that its charter purports to authorize, and that is convenient to be done, yet the stronger and overcoming presumption is, that it is not disobeying any law, organic or otherwise.”

I think, myself, that apart from the question as to whether this corporation can be abstractly called a bank, by virtue of its act of incorporation, and powers conferred by that act, the only question, if there be any question, is, “ what are the powers it is exercising in this territory, and what is the business in which it is engaged?” It may have, in my judgment, many interdicted powers, or more than one, considered with reference to the locality of Washington territory; but if it goes there exercising only the powers which are permitted, as to the interdicted ones, they do not exist. Whoever alleges it is exercising, or attempting to exercise, interdicted powers, and therefore is unlawfully in that territory, must prove the allegation to be true. There is no presumption, as Mr. Justice Greene says, that “ it is there, violating or intending to violate the laws of the territory.”

Another objection is made to the relief demanded in this bill on the ground of the inability of the plaintiff to exercise the powers claimed by it in Washington territory, and that is, that it is created by a special act of Colorado. This objection is founded upon Sec. 1889 of the Revised Statutes, which is applicable to all territories, and reads as follows:

“ The legislative assemblies of the several territories shall not grant private charters or especial privileges, but they may, by general incorporation acts, permit persons to associate themselves together as bodies corporate for mining, manufacturing and other industrial pursuits, or the construction or operation of railroads,

wagon roads, irrigating ditches, and the colonization and improvement of lands in connection therewith, or for colleges, seminaries, churches, libraries, or any other benevolent, charitable or scientific association."

Now, it is argued, first, that because a corporation cannot be organized in Washington territory by a special act of the legislature, but must be organized under the general law, therefore a corporation existing before this restriction was made, under a special act of a sister State or territory, cannot come into that territory and exercise the powers, although they are in no way excluded by the law of the land, or contrary to the public policy. The ground is, that it is not brought into being in the peculiar or particular way in which the general law now requires corporations to be formed in Washington territory. But I cannot see that *there* is anything in this objection. There is nothing in Sec. 1889 to prevent any corporation exercising its powers in Washington territory in particular cases. Everybody who is familiar at all with the history of the growth and organization of corporations in the United States knows that this rule requiring corporations to be organized under a general law is the growth of some years, and has grown out of the confusion, corruption, the partial and inequitable legislation that was the result of allowing parties to go before the legislature and ask for a special charter. The time of the legislature was unnecessarily consumed by it; the integrity of the members of the legislature was unduly exposed; or, through the ignorance or carelessness of the legislature and the astuteness and diligence of designing and over-reaching men, there were constantly coming to light obscure clauses in these acts of the legislature giving powers and granting privileges which were unjust, inequitable, and which would never have been done with the knowledge of the legislature.

Therefore, owing to the evils resulting to the territory of Washington, to the people, and to the legislature, this act was passed, and has no reference whatever to the fact whether a corporation, otherwise formed, might exercise powers in that territory not prohibited or contrary to its public policy. It is a matter of no moment whatever to Washington territory, that corporations in Colorado are created by special act. The people of the latter territory are not corrupted by it; the legislature is not *corrupted* by it; their time is not taken up with it. The only interest that they have in the matter is the interest that any portion of the people of the United States have in the welfare of all the other people in the United States. See also, on this point, the remarks of Mr. Justice Field in *Cowell v. Springs Co.*, 100 U. S. 59.

With reference to the effect of this limitation upon the power to form corporations within the territory, I quote again from the opinion of Mr. Justice Greene:

“ Again, defendant urges that, under the second clause of Sec. 1889, the territorial legislatures can, by general incorporation acts, authorize the formation of corporations for those purposes only which are specified in that clause; that plaintiff is not a corporation within the limitation unless its business be an industrial pursuit; that to be within the limitation its business must be not only industrial, but of a character like mining and manufacturing; that its business is neither of that character, nor industrial, and that, therefore, since its like could not by private or general statute be formed within the territory, its admission to do business in the territory is prohibited by the spirit of the section. But this clause refers merely to the formation of domestic corporations, and has nothing to do with domestic recognition of foreign corporations. Besides, I think plaintiff's pursuit is industrial. It is such according to ordinary usage of words.”

It is objected that this corporation is unable to come into Washington territory to do business there because it is not a corporation engaged in “ industrial pursuits.” The objection hinges about these words. What is the character of “ mining, manufacturing and other industrial pursuits?” It is maintained that this express company is not engaged in an “ industrial pursuit,” and that if it is engaged in an industrial pursuit in the abstract sense of the words, it is not engaged in such an industrial pursuit as mining and manufacturing, and that the words “ industrial pursuit,” being coupled with “ mining and manufacturing,” are restricted in their signification to the general scope covered by those words, “ mining and manufacturing.” I think, myself, that this is entirely too narrow a signification to be given to those words. “ Industrial ” is a very large word, and, although it is associated with the words “ mining and manufacturing,” it would be, it seems to me, contrary to the manifest purpose of Congress in this passage to so restrain it as that the pursuit must be literally, or almost literally, a mining one or a manufacturing one. Could not a corporation in Washington territory be formed under this law to engage in raising wheat?

This is neither mining nor manufacturing in any literal sense of the word; it is producing. Could not a corporation be formed under this law, or under a law passed in Washington territory, to engage in navigating Puget Sound? I do not think there is a specific provision for a navigation company; there are for wagon roads and railroads, but there is none for steamboats. But I suppose it is hardly questionable that the legislature might provide, by a general law, for the incorporation, in Washington territory, of a company to navigate Puget Sound. An “ industrial pursuit,” it may be said also, in the case I put of farming, is covered by the words “ colonization and improvement of lands in connection therewith,” but these are limited by the words “ railroads, wagon

roads, irrigating ditches," and it is doubtful whether the colonization of lands and the improvement of lands, standing by itself, includes farming, raising wheat, flax, hops and corn.

I want to add here, that I am not prepared to say that if this Sec. 1889 expressly, or by fair construction, prevents the territory of Washington from providing for the incorporation of a company to carry on an express business within its limits, that it is a sufficient indication of the public policy by the law-making power of that territory to overcome the presumption that by comity this plaintiff is allowed to transact its business there; I repeat, if this act could be fairly construed as inhibiting the legislative assembly of Washington territory from providing for the incorporation of an express company in that territory, I think it would be such a manifestation of public policy by the law-making power, the supreme power there, as would exclude this plaintiff from doing business in the territory, at least on the ground of comity. It would have no right, as a matter of comity, to do a business there as a corporation which the territory itself is prohibited from authorizing a corporation to engage in. But I think the express business is an industrial pursuit, and one which the territorial legislature could provide for the formation of corporations to engage in.

The next objection to this relief is, that the plaintiff has not complied with the laws of Washington, Dakota, Montana and Minnesota, the State and territories through which defendant's road runs, concerning express companies doing business therein, and that, therefore, it has no right to enter these places, and cannot complain if it is not allowed express facilities upon defendant's road therein. To begin with, I have a very strong impression that it does not lie in the mouth of the defendant—a corporation engaged in the business of a common carrier—to say to this plaintiff, "You have not complied with the laws of these territories concerning the transaction of business therein." It does not seem to me that it is a matter which concerns the defendant. It does not seem to be a matter that the defendant can judge of; and I think the case I put to counsel on the argument has not been answered; that is, supposing the law of Washington territory provides that no person shall be engaged in peddling jewelry in that territory unless he has taken out a license and paid for it, and a person with pack upon his back, peddling jewelry, offers to go on board of defendant's train, having purchased a ticket for that purpose, can the defendant object and say: "You are a peddler, peddling without a license; you have no right here; we cannot carry you." I do not think the defendant can. The matter is one for the State or territory, and not the defendant. However that may be, I think the burden of proof is upon the defendant to show that the plaintiff is not qualified to act as an express company within these

territories. I think that if the plaintiff failed to comply with any particular required by the laws of these territories, the burden of proof is cast upon the defendant to show it. There is no presumption that the plaintiff has not complied with the law, as all men are presumed to obey the law and comply with it, until the contrary is shown. The plaintiff alleges in its bill that it has complied with the law. The defendant alleges in its answer that the plaintiff has not complied with it, but does not state wherein the plaintiff has not complied with it.

The defendant alleges that the plaintiff has not complied with the law, but does not state wherein. The affidavits in support of plaintiff's bill, made by its manager and officers, who ought to know whereof they speak, are clear, full and explicit, and are to the effect that they have complied with the law, and on the argument it was substantially admitted by counsel for defendant that the plaintiffs attempted to comply with it; but, in his judgment, there was some technical defect, which was not very particularly stated. I apprehend it is not a very serious matter. I shall assume, then, that these laws have been complied with, and that, therefore, as far as that objection is concerned, it has no weight.

But supposing that none of them had been complied with by the plaintiff, or that plaintiff had not undertaken to comply with them. Plaintiff is engaged in an inter-State commerce. There can be no commerce without transportation. Transportation is one of the essential elements of commerce, the means by which commerce is supported. The plaintiff is engaged in transportation between these points, and is engaged in an inter-State commerce; and, in my judgment, no territory or State can impose upon it any conditions by way of license or otherwise to engage in this commerce by passing through its limits. Of course, the right to engage in inter-State commerce is not a right to do a local business within the territory, and therefore the plaintiff has no right to do an express business in Washington, Idaho, Montana and Dakota, if it has not complied with their laws. But if it has an existence, and is authorized generally to do an express business, it may do it, so far as inter-State commerce is concerned, without reference to these laws. I think this is very clear both on the authorities and the reason of the case. The case of the Pacific Coast Steamship Co. v. the Board of Railway Commissioners, 18 Fed. Rep., 10, is a case directly in point.

I have not been able to come to any definite conclusion how far the legislation of Congress on the transportation of dutiable goods affects this question.

It seems that in 1870 Congress passed an act to facilitate the transportation of dutiable goods from the ports of entry on the seaboard to important points in the interior. It has amended the act once or twice since—once in 1880 and once in 1884. By the

act of 1880, Portland was made one of the points from which goods from foreign ports might be transported in bond to the interior without paying duty at this point, and by the act of 1884, in addition to the provision that whoever undertook to carry these goods should be treated and considered as a common carrier for that purpose, it was expressly provided that they might be carried by express companies in such boxes or safes as they usually had or furnished for like articles. The act goes upon the assumption that an express company is a safe mode of conveyance, and a recognized mode of transporting such things, without special provision as to what should be the character of the vehicle, the box or safe. How far that should be considered a regulation of commerce, under which this plaintiff may carry goods from Portland to St. Paul, irrespective of any inimical or restraining legislation of the territories between Portland and St. Paul, I am not prepared to say. It is not necessary to decide it, though the inclination of my mind is that it has some effect upon the matter in favor of the plaintiff.

The next objection is that the defendant is not able to furnish the facilities, admitting that plaintiff has a right to them. Upon this phase of the case, counsel for the defendant, with his usual ability and zeal, insists that if there is a conflict of evidence upon that point, the court is powerless to act, as it is not at liberty to weigh evidence—to decide either from the number of witnesses on the one hand, and the scarcity on the other, or from the inherent probability of the testimony, or from the circumstances which are commonly known to all men, or altogether, but is powerless to act from the simple circumstance that there is a conflict of testimony in the affidavits concerning this question of its ability to furnish these facilities. I understand counsel to maintain that this proposition extends to any material question that may arise on the application for an injunction, that is involved in the conflict of evidence—one against a thousand although it be; that in such case the court has not the power to act, particularly in the case of an application for a mandatory injunction. I must admit that this doctrine is new to me. I do not think it can be found in those words, or anything like it, in the books; but I conceive the true doctrine to be, that, where there is a conflict of evidence, the court must decide, and act according to the weight of evidence. But I can see very readily that the court might require more satisfactory and conclusive evidence in one case than in another, owing to the effect or consequence of its action. If its action were merely conservative, and could do no harm, it might be at liberty to act where there was a well-balanced conflict of statement. But if its action might seriously injure or inconvenience the defendant, it might very properly refuse to act where the evidence was at all equal and conflicting. With this understanding of the rule of

evidence in these matters, I now proceed to dispose of this point. There are two affidavits made by the officers of this defendant corporation. They state in so many words that the defendant is not able to furnish these express facilities, and goes on to say wherein they are unable to do so. They say, first, that it would require an additional car beyond Missoula for the plaintiff to do its business in, and they have none; that if an additional car is put on the train for the express company, the weight of the train would be increased, and the propelling power is now so evenly balanced, that, with an additional car, it would require another locomotive, and that would put the company to very considerable expense. I asked the counsel for the defendant, in the course of his argument, if he expected the court to believe that this defendant corporation, with all its power, wealth and resources, was really unable to furnish an express car to this plaintiff, and the counsel, of course, had not the hardihood to state that he thought the court would be expected to believe it, but only that the defendant meant, that to do it would take some little time. Of course, taking that view, the statement does not amount to much. It may be that defendant corporation has not a car which at this moment it can divert to the use of the plaintiff. But it can supply a car in five or six or ten days, that is practically the same thing. In my judgment, it can do so to-morrow if it wants to. The testimony on the part of the plaintiff shows that the car which is used by the plaintiff from Wallula Junction to Missoula is carried from there to Helena empty, and there is no reason why it should not be used by the plaintiff to Helena, except the desire of the defendant not to allow the plaintiff to use it. Of course, when it reaches Helena, the plaintiff is in the centre of business in that country. It is in reach of another railroad, the Northern Utah, by means of which it has access to the Central and Union Pacific roads. The defendant allows the plaintiff to go to Missoula, and there requires it to leave the train, and the car is carried from there empty. In this connection, it must be noticed, as a material circumstance, that there is a rival express company upon this road, the Northern Pacific Express Company, and it is manifest that the defendant intends to give the express business over its road to this company, if it has a lawful right to do so.

In considering the question whether the defendant has furnished facilities to the plaintiff, as it ought to, and whether it is able to do so, or whether this is an excuse for not doing what the law requires it to do, the Northern Pacific Express Company and its relations to this defendant is a very material circumstance. One of the affidavits, stating that the defendant is unable to furnish an express car, is made by an officer of the defendant and of the Northern Pacific Express Company. The fact that its stock is owned largely by the men and people in the Northern Pacific

Railroad Company, and is, in fact, its other self, is a very material circumstance. The defendant may have been advised that, being a railway corporation, it was not competent to do an express business, and therefore it has undertaken to do so as nearly as it can, and has formed a corporation for that purpose, that is, in fact, itself. It is also stated in these affidavits that the plaintiff will not be injured if this relief is not granted, because the express business is overdone east of Missoula. There is such competition between the American Express Company and the Northern Pacific Express Company, that they are carrying at losing rates. This is a matter which does not concern the defendant upon any theory in this case which can be taken into consideration. Whatever the fact may be in relation to the Northern Pacific Express Company, as to its connection with the Northern Pacific Railway Company, in the eye of the law it has no more relation to it than it has to the plaintiff; it has no more interest in one than the other. It is no matter to the defendant if they are both broken up in the express business, so that they pay for the services which they require. This is not a matter of any moment to the defendant. Nor is it probable that, if the defendant is allowed express facilities upon the defendant's train east of Missoula, there will be any need either of additional power or cars. It does not follow that any more business is going to be done. I won't say—I am not sufficiently well informed to say—that there would be no need of another car. It is not probable that the bulk of the goods transported would be materially increased. And there may be room for both companies in one car, if it would not be disagreeable to the employees. Instead of having separate cars, the one now in use might be partitioned

The result would be that Wells, Fargo & Co. would have their share of the business, and what they would do the Northern Pacific Express Company would not do. There probably would not be any particular addition to the business. It would be distributed between the two companies. Wells, Fargo & Co., having been on the ground so long a time, and having now access to the business, would do its share of it, and by as much as it did, the Northern Pacific Express Company would do less. Besides, the plaintiff is not entitled to this injunction, except upon giving security to pay whatever is right; and it comes to this, that if the defendant has to put on another locomotive, or has to put on another car, it is one of the circumstances to be considered, and should be charged for. Of course, the main question in this case, as to whether the plaintiff is entitled to these facilities, and whether it is the duty of the defendant to furnish them, has been decided in this court in the case of Wells, Fargo & Co. against the Oregon Railway and Navigation Company, and the Oregon & California Railroad Company. 8 Sawyer, 600. It is not now proposed to consider that question any fur-

ther. It is a serious question, and an important one, which awaits the final decision of the supreme court. If the ruling of this and other circuit courts is affirmed in the Supreme Court of the United States, the question is settled in favor of the plaintiff; if otherwise, of course, the question is decided in favor of the defendant. But for the time being, we go upon the assumption that the defendant is under obligation to furnish reasonable express facilities to the plaintiff, or any other express company that wishes to do business on its road.

Another point was made, and that was, that this application has been delayed. This objection is made particularly with reference to the mandatory character of the injunction. But the delay in this case has not worked any prejudice whatever to the defendant; it has worked to its advantage, if it be an advantage to keep the plaintiff off its road; it has not changed its condition; it has not built up a wall which it has now to take down; it has not done anything which it would have to undo. In so far as it has had any effect, it has been to its advantage, if it be an advantage, as I apprehend it is, to keep the plaintiff off its road. The delay is more apparent than real. I think the fact is that the defendant has been operating this road about fourteen months, and it appears from the affidavits in this case that the plaintiff commenced a suit in Washington territory prior to that time, and maintained there until a short time since, when the defendant came into this State with its road from Kalama to Portland, whereupon the plaintiff commenced this suit, and shortly after dismissed the other. The delay is more apparent than real, but if there was an actual delay, there is nothing in it which can prejudice the defendant. If anybody has suffered by the delay, it is the plaintiff and not the defendant.

There is only one other question to be considered—that is, whether a mandatory injunction ought to be issued in a case of this kind, that is, so far as this is a mandatory injunction. It is laid down in Pomeroy's Equity Jurisprudence, Sec. 1539, "that where the injury is immediate and pressing, and irreparable, and clearly established by the proofs, and not acquiesced in by the plaintiff, a mandatory injunction ought to issue." An injunction as an equitable remedy has grown wonderfully in the last fifty years, and, of course, if we are to be guided by decisions and dicta prior to that time, the court would often fail to exercise this power where it is necessary. I think myself, with Professor Pomeroy, that very much of the objection and argument that has been made against the allowance of a mandatory injunction in times gone by is simply absurd; and that it was absurd is manifest by the practice of the courts of evading the rule—admitting it by mouth, but overruling it in act—that is to say, admitting that the authorities stated that a mandatory injunction ought not to be allowed, and at the same time enjoining a

party to do some affirmative act in a negative form. When the injury is immediate and pressing, and at the same time irreparable, and the right to relief is made out clearly upon the proof, there is no reason why a mandatory injunction should not issue. In this case, although the injunction is mandatory in form, it is in effect negative; it can do no harm to the defendant, even if it should turn out to be wrong. It is simply an equivalent to the ordinary provisional injunction. The defendant is engaged in operating this road; it is there for the purpose of carrying all express matter which can be gathered up, and brought to it, to be carried between its termini. Considered as the Northern Pacific Railway, and not as a private partner of the Northern Pacific Express Company, in which light we have no right to regard it, considered simply as the Northern Pacific Railway Company, it is a matter of no particular moment to it whether the express matter is furnished by Wells, Fargo & Co., or by the Northern Pacific Express Company. Therefore the defendant cannot be injured, in any legal sense, if it be required to furnish these facilities to Wells, Fargo & Co., provided that Wells, Fargo & Co. give a bond to compensate the defendant in every respect for the reasonable expenses incurred in furnishing the facilities. Much of the law and argument on the subject of mandatory injunctions has very little application to this case, because, while it is mandatory in form, it is hardly so in effect. It simply requires the defendant to do that which it ought to do—to carry express matter if furnished by A. as well as by B., being paid for at the same rate, and making the same amount of money out of it.

These, I believe, are all the points made by counsel for the defendant in his elaborate argument in this case. I do not think he has left anything unsaid or any stone unturned. The main question—as to the duty of the defendant to furnish plaintiff express facilities—I have passed on before; and the particular and peculiar ones made in this argument have been so thoroughly and well considered by Mr. Justice Greene, in the case in Washington territory, between these same parties, that I might have contented myself by simply referring to his opinion, from which I have already quoted.

The order of the court will be that the defendant be required to furnish ordinary express facilities to the plaintiff on its road between Oregon and St. Paul, and connecting lines or links, whatever they may be, and to furnish the plaintiff such facilities as the defendant furnishes any other express company; and, in addition, that the plaintiff give a bond, to be approved by the master of this court, in the sum of \$25,000, to pay all costs, charges and damages which the defendant may incur. I have fixed this sum, but if the counsel for the defendant thinks the sum ought to be greater, I will hear him now, or at any time. Possibly at some future time it may be necessary to increase the bond.

Inter-State Commerce.—For a collection of authorities relative to the right of a railroad company engaged in inter-State commerce to be free of State or territorial regulation, see *Illinois Central R. R. Co. v. Stone*, *supra*, and *Hardy v. Atchison, T. & S. F. R. Co.*, and note, *supra*.

Express Companies.—As to the duty of railroad companies to afford express facilities, see *Baltimore & Ohio R. Co. v. Adams Express Co.*, *infra*; and *Fargo v. Redfield et al.*, and note, *infra*.

BALTIMORE & O. R. Co.

v.

ADAMS EXPRESS Co.

(*Advance Case, U. S Circuit Court, D. Maryland, November 20, 1884.*)

The Adams Express Company is a joint stock association formed under the laws of New York, which provide that such an association shall have nearly all the essential attributes of a corporation. *Held*, that suit against it should be brought against either the president or treasurer, and that those officers being citizens of New York, it follows that whether the association be treated as a New York corporation, or the officer sued be treated as a *quasi* corporation sole, or as an official person designated by statute to represent the association, in any event the defendant is a citizen of New York, and the federal court has jurisdiction so far as it depends on citizenship.

If it is shown that advancing "accrued charges" by a receiving to a tendering carrier is an established usage in the express business, and that a carrier grants this facility to certain carriers, and refuses it to another, for the purpose of making a discrimination which is necessarily prejudicial, it would seem that such a discrimination should be held unlawful. But in this case, in view of the adjudications in other circuit courts in cases between the same parties, an injunction requiring the defendant to advance accrued charges was refused.

Under the circumstances of discrimination shown by the affidavits in this case, *held*, that the defendant should be required to receive express matter tendered to it by complainants for further transportation, and should collect its accrued charges from the consignees, and account for the sums so collected without charge, and should be required to receive from shippers, without exacting prepayment thereon, express matter destined for complainants' lines, provided complainants tender itself ready to pay the charges thereon when transferred to it.

In Equity.

Application for a preliminary injunction.

Cowen & Cross, for complainants.

R. Stockett Matthews and *I. Nevitt Steele*, for defendant.

Before Bond and Morris, JJ.

MORRIS, J.—This bill is filed by the Baltimore & Ohio Railroad Company, a corporation of the State of Maryland, and the Baltimore & Ohio Express Company, a corporation of the State of Ohio, against the Adams Express Company, alleged in the bill to be a corporation under the laws of the State of New York, and a citizen of the State of New York. The bill alleges that the Balti-

more & Ohio Railroad Company, with its railroad, and those which it controls by lease or ownership, constitutes one of the through trunk lines of the United States between the East and West, and that by an act of the Maryland legislature of 1882, it is authorized to do an express business such as is done by express companies organized for that purpose. It is alleged on behalf of the Baltimore & Ohio Express Company of Ohio that it is engaged in the express business in the West over the railroad lines controlled by the Baltimore & Ohio Railroad Company, and, in conjunction with the Baltimore & Ohio Railroad Company, is operating the Baltimore & Ohio Express over the lines between Cincinnati, Baltimore, New York and elsewhere. It is alleged that the Baltimore & Ohio Railroad Company, in the development and conduct of this express business, has, in connection with the Baltimore & Ohio Express Company of Ohio, expended large sums of money in the purchase of horses, wagons and other property suitable for that use, and has established offices in St Louis, Cincinnati, Chicago, Washington, Baltimore, Philadelphia and New York, and many other cities, and is doing a very large and profitable business in carrying goods, money, valuables, oysters, fruits, and perishable goods. It is alleged that the Adams Express Company, the United States Express Company, the American Express Company, the Southern Express Company, and the Southern & Pacific Express Company, and Wells, Fargo & Co., in connection with complainants, do a large portion of the express business of the country, and that it is the universal custom of said companies to receive from and deliver to each other packages for points beyond their own routes, so that a package for a distant point is transferred from one express company to another as often as required to reach its destination; and that, in order to facilitate dispatch, promptness and simplicity in these transfers, there has grown up a custom, which is universal, by which the receiving company pays to the tendering company all charges which have accrued for carriage to the point of tender, known as "*accrued charges*," so that the last company, having advanced all the accrued charges, receives from the consignee and retains the whole amount of charges to the point of destination. It is alleged that experience has proved that this method of doing business is entirely safe, as the advancing company is protected by its lien on the goods and its right of recourse against the company to which the advance is made, and that in fact it very rarely happens that the consignee refuses to accept the package and pay the charges on it. It is alleged that this practice of advancing accrued charges is essential to the quick and simple transfer of express packages from one company's line to another, and that without it the express business as now conducted could not be carried on, and that any company which is denied this facility would not be able to compete in the same business with another company to which

it was granted, and would find it impossible to do a general express business, and would lose its customers. It is alleged that the Adams, the United States and the American Express Companies, with which the complainants have been doing a large business on the basis of said facility, have combined together, and have notified complainants that after the fifteenth of October, 1884, they would not advance charges on express matter transferred to them by complainants. It is alleged that this combined action of said companies is designed to cause and will cause great and irreparable injury to complainants, and will be destructive to their business. It is alleged that the Adams, the United States and the American Express Companies, although they have notified complainants of their intention to refuse to advance charges to them, will continue to afford to each other the facilities refused to complainants, with the design to further their own business in competition with complainants.

The prayer is for a preliminary injunction restraining the Adams Express Company, the defendant, from refusing to accept parcels tendered it by complainants, and from refusing to pay the advance charges thereon, according to the usage theretofore recognized and observed by said company in its dealings with complainants, and requiring defendant to afford the same business facilities to the same extent to complainants which it affords to other express companies, and for other relief. At this hearing of the motion for a preliminary injunction, it is urged by defendant's counsel that the bill is defective in that the Baltimore & Ohio Railroad Company and the Baltimore & Ohio Express Company are joined as complainants without any sufficient allegation of a joint interest in the express business, which, it is alleged, is injured by defendant's action; so that it does not appear but that the injury which complainants allege they apprehend may be a distinct and separate injury to each complainant corporation, and not a joint injury. The objection is, in its nature, a demurrer to the bill. The allegation of the bill is, that the Baltimore & Ohio Express Company is engaged in sending express matter over the lines of road connected with the Baltimore & Ohio Railroad Company in the West, and, in conjunction with the Baltimore & Ohio Railroad Company, operates the Baltimore & Ohio Express over the line between Cincinnati, Baltimore, New York and elsewhere. In our opinion, this allegation may be true, and yet consistent with a state of facts which would make the injury to each corporation separate and distinct. The bill, therefore, must be amended either by dismissing one of the complainants, or, if the apprehended injury be in fact a joint injury, by making the allegation to that effect sufficiently explicit.

The second objection is to the jurisdiction of the court, and is made by a plea in abatement, in which it is alleged that the Adams

Express Company is not a corporation or joint stock association, but a simple copartnership, the parties interested therein having in 1854 signed written articles still in force, and that forty-four of said copartners are residents in and citizens of the State of Maryland. The conceded fact is that the Adams Express Company is a joint stock association consisting of some 2500 shareholders, citizens of many different States, organized under the laws of the State of New York, having a president, treasurer and other officers, and a board of managers, and that its shares are freely dealt in on the stock market. The New York statutes applicable to such an organization may be found in 3 Rev. St. N. Y. 1875, p. 762; 2 Rev. St. N. Y. 1882 (7th Ed.), p. 1543; Code Civil Proc. Sec. 1919; Const. N. Y. Art. 8, Sec. 3. By one section of these statutes it is provided that the associations mentioned therein shall not have the rights or privileges of corporations, except as therein provided; but that they have the essential attributes of corporations has been declared by the courts of New York.

In *Waterbury v. Merchants' Union Exp. Co.*, 50 Barb. 160, the supreme court said:

"By an examination of these statutes it will be found that joint stock companies possess the following qualities or attributes of corporations: (1) They can, like corporations, sue and be sued in a single or collective name, to wit, the name of their president or treasurer. (2) Their property or capital is represented in shares or certificates of stock, differing in no respect from shares or stock certificates of corporations. (3) The death of a member, his insolvency, or the sale or transfer of his interest, is not a dissolution of the company. (4) They have perpetual succession, or what is sometimes called the immortality of corporations. (5) They can take and hold real and personal estate in a collective capacity and in perpetual succession. Corporations have no other attributes except the technical one of a common seal."

The statute provides that such an association may sue and be sued in the name of the president or treasurer for the time being, and provides that the president and treasurer shall not be liable by reason of such suit in his own person or property, but that the suit shall affect only the joint property of the association. It is intimated by the New York Court of Appeals (60 N. Y. 532) that the officers who have thus by the statute legal succession are constituted a corporation in the nature of a corporation sole. Whether this view is to prevail or not, the officer sued does, by the statute, represent the association for the purpose of suit and judgment. If, as individuals, they represent the company as a trustee represents his *cestui que trust*, then it is the citizenship of the individual sued which determines the jurisdiction of the court. This view was held by one of the courts of New York in *Bacon v. Dinsmore*, 42 How. Pr. 377, in which it was ruled, on the appli-

cation of the Adams Express Company for removal to another State court, that the citizenship of Mr. Dinsmore, its president, determined the right of removal, and not the citizenship of any of the shareholders whom by statute he represented. In the case of *Fargo v. McVicker*, 55 Barb. 437, on a question of removal from a New York State court to a federal court, the New York Supreme Court allowed the removal, holding that such associations were governed by the same principle as to removals as corporations, and that by the New York statutes the numerous shareholders were embodied, for the purpose of suing and being sued, into a new legal personality of the name used in the action, and that in this respect they were the same as a corporate body. The case of *Adams Exp. Co. v. Trego*, 35 Md. 47, in which, alleging that it was a corporation of the State of New York, the Adams Express Company sought to remove a case, because of that alleged fact, to the federal court; and the case of *Rosenfield v. Adams Exp. Co.*, 21 La. Ann. 234, in which, in the Louisiana Appellate Court, it procured a reversal of a judgment against it upon the ground that it was such a corporation, and that its petition for removal to the federal court ought to have been granted; and numerous other cases brought to the attention of the court, in which it has submitted to be sued as a New York corporation,—tend to show that, in the opinion of the experienced counsel by whom it has at various times been represented, it was considered a New York corporation, and has enjoyed the important privileges of one.

Our attention has been called to the able opinion of Judge McKennan in *Dinsmore v. Philadelphia & R. R. Co.*, delivered October 25, 1875, but as we find that a different ruling has prevailed in other circuits, we have felt it our duty to adhere to that which seems to us best supported by reasoning, analogy and convenience. See *Maltz v. American Exp. Co.*, 1 Flippin, 611; s. o. 3 Cent. Law J. 784; *Fargo v. Railroad Co.*, 6 Fed. Rep. 787. We think, however, that the complainants, in availing themselves of the New York statute, must pursue its terms, and must amend their bill so that the suit shall be against the president or treasurer (neither of whom, it is conceded, are citizens of Maryland). The Maryland statutes have made special provision for such cases by providing (Sec. 36, Art. 67, Rev. Code 1878) that process may be served upon any person, firm, partnership association, company or corporation, transacting the business of a carrier in this State, by service on any officer or agent. We pass, then, to the consideration of the merits of the complainants' application.

It is the duty of common carriers to give equal service on equal terms, and upon reasonable compensation, to all who may apply to them, and it is the duty of the courts to enforce these obligations by appropriate remedies. The great utility and almost

necessity of the practice of the receiving express company advancing to the tendering company its accrued charges on the package tendered, as the business of express carriage is now conducted over the territory of the United States, is fully shown by complainants' affidavits, and is not denied. It is also shown how smoothly and safely to all parties the business between connecting carriers proceeds under this practice, and how difficult it would be to conduct the business without it. It is to be considered, however, that the defendant is not like a railroad company, which is a *quasi* public corporation, and in some States is declared by statute to be a public highway, and which is held bound to furnish reasonable and customary facilities to its customers. The express company has had no franchise granted to it, and in the absence of statute its liability is to be determined by the rule of the common law. The advancing of accrued charges is not imposed on carriers by the common law, and the right of any one to demand that this facility be accorded to him, if such right exists, must rest on unjustifiable discrimination; he must show that in substantially similar cases the carrier complained of grants the facility to others in like situation with himself, and refuses it to him, and that this refusal is a discrimination necessarily prejudicial to him.

The affidavits filed by complainants declare that the practice of advancing charges is universal, but respondent's affidavits assert that no such practice prevails between two companies who are competitors for business at the point from which the package starts. In reply it is suggested that although this may be so, it is only so because, by agreement and understanding between the companies complained of, they do not compete with each other, and at points where more than one of them has an office, they each solicit business only for points reached by each exclusively, having in fact an understanding with each other as to the territory to be served by each. As complainants must rely upon the fact of discrimination, if for any reason that which is not granted to them is not granted to any other in like situation, then the ground for relief fails; and the exception said to exist to the practice of advancing charges seems to us a reasonable exception.

It would be unreasonable, it seems to us, to require a company which had a through express route, say from St. Louis to York, Pennsylvania, to take a parcel at Baltimore from a company which had competed with it for the business at St. Louis, and could only carry it as far as Baltimore, and to require the receiving company at Baltimore to advance and pay to its competitor its charges. In such a case the competing company would receive its pay for the carriage from St. Louis to Baltimore from the company having the through line, before that company would itself receive its pay for the same service on the parcels which it was carrying itself, destined for York. Its competitor would fare at its hands better

than it would fare itself on its through business. We are of opinion, therefore, that, at what are called in Mr. Trego's affidavit "competing points," defendant cannot be required to deal with complainants otherwise than upon the same terms as it deals with others in like situation, and we are not convinced by the affidavits that it does, under such circumstances, advance charges. But looking to the nature of the express business in this country, and the established methods generally pursued in its conduct, which have been made known and explained by the affidavits of the numerous managers of great experience in the business, and some of which are matters of common knowledge, are there any circumstances under which an express company can be required to advance accrued charges to a tendering company? The settled rule is, that a carrier cannot unreasonably discriminate against one customer in favor of another; it can make no distinctions which will give one employer an advantage over another. Hutch. Carr. Secs. 279-303. Stock-yard Cases, 3 Fed. Rep. 775, and 13 Fed. Rep. 3; Hays v. Pennsylvania Co., 12 Fed. Rep. 309. Under ordinary circumstances the advancing of accrued charges to one customer and the refusal to do so for another, or demanding prepayment from one customer and not requiring it of another, might well be held not to be an unjustifiable discrimination, but a mere matter of discretion. But is this so in a case in which the distinction is made arbitrarily, and the necessary result is to destroy the business of one customer and build up that of another? Can this possibly be consistent with that obligation of strictest impartiality to which carriers are rigidly held, and the violation of which is condemned by all courts as a disregard of their legal obligations?

It must be conceded that the general rule is that a carrier cannot be compelled to carry without prepayment, and, *a fortiori*, a carrier cannot ordinarily be compelled to advance its own money to its customers; but when, by its encouragement, a system has grown up of which advancing charges is an essential feature, and when it does advance charges for some of its customers and refuses to do so for others, and it is shown that this discrimination is necessarily fatal to the business of those to whom the facility is refused, and it is further shown that the facility imposes no risk or inconvenience upon the carrier granting it, and is an essential facility and established usage of the business, is it going too far to say that in this respect, as in others not more essential, all must be treated alike? We strongly incline to the opinion that this reasonable doctrine must prevail. It seems to us that the evils resulting from such a discrimination, if allowed, are quite as apparent and dangerous as any of those which have been held to be unlawful. In this opinion, however, we differ from at least two others of the circuit courts of the United States in which this

same question between the same litigants has very recently been passed upon, and, in this condition of the litigation over this question between these parties, we shall not grant the preliminary injunction with respect to accrued charges, as prayed for.

Aside from the question of advancing accrued charges, is there any other relief prayed for which complainants are entitled to have granted on this motion? The affidavits of defendant substantially admit that, aside from the matter of refusing to advance charges, it does, in other respects, propose to discriminate against the complainants.

It is alleged in defendant's affidavits that complainants have refused to stand to any agreement with the other companies in respect to the express rates to be charged the public, and it is alleged that the express business done by complainants is not charged by the Baltimore & Ohio Railroad Company with the usual charges made by railroad companies to express companies, and that thus, having the use of the railroad lines without charge, complainants have reduced their express charges below a fair and reasonable living rate for such service, and that, to protect themselves from this unfair competition, the three express companies mentioned in the bill have found themselves obliged to refuse to facilitate complainants' business. However well founded these alleged grievances may be, they cannot justify defendant's refusal to carry goods tendered by or destined for the complainants upon reasonable and customary terms.

It is stated in the affidavit of Mr. Hoey, the defendant's vice-president, that the three companies mentioned in the bill to prevent the Baltimore & Ohio Express from seducing their clients and customers, have notified it that after the fifteenth of October, 1884, the three companies would not receive from the Baltimore & Ohio Express Company express matter, and pay the charges of the Baltimore & Ohio Express thereon, and that they would not thereafter receive express matter destined to points reached by the Baltimore & Ohio Express exclusively, until the charges of the receiving company were prepaid thereon by the shipper. He states "that said three companies have never refused, nor are they now refusing, to receive from the Baltimore & Ohio Express Company all its express matter, and to convey the same to its destination on their lines, and there to collect the charges from the consignee." Exclusive, then, of the question of advancing accrued charges, there are two classes of cases with regard to which complainants ask relief: that is to say, the cases in which express matter starts from points on the lines of complainants and is tendered to respondents for further carriage, and the cases in which express matter starts at points on the lines of respondent destined for points reached by complainants exclusively.

As to the first class of cases, while we have said that we will

not by injunction require defendant to advance charges, we see no reason why defendant should not be required to collect the accrued charges with its own from the consignee, and account for them to complainant. Indeed, that would seem to be the offer contained in the language used by Mr. Hoey, the defendant's vice-president, in his affidavit. This accounting can be done in such manner and at such reasonable times as will impose the least labor and inconvenience on both parties. There can be no hardship in requiring this to be done without charge, as confessedly the ordinary course of business of this defendant, except in dealing with the complainant, is to advance the accrued charge, and make no charge for the ultimate collection.

As to the second class of cases, the affidavits sufficiently show that to require prepayment of defendant's charges from the shippers, who tender packages to respondent destined for points reached by complainants' lines exclusively, would be an oppressive discrimination, highly inconvenient to shippers, and calculated to cripple the business of complainants on their own exclusive lines. And, as to this class of cases, we think it is the duty of defendant to receive such packages without prepayment from shippers, provided complainants agree and are ready to pay respondent's charges upon such packages on their being delivered to them. The defendant cannot be required to part with possession of such packages unless its charges are paid; but if complainants are willing to advance the charges, then defendant is without justification in refusing to accept the packages without prepayment by the shippers. If the amendments we suggest as necessary are made, we will grant an injunction to the extent and upon the terms indicated in this opinion.

Bond, J., concurred.

General Reference.—For a collection of the authorities as to the obligation of a railroad company to afford express facilities, see *Fargo v. Redfield, et al.*, *infra*.

FARGO .

v.

REDFIELD *et al.*

(*Advance Case, U. S. Circuit Court, D. Vermont, November 29, 1884.*)

An injunction may be granted by the circuit court to restrain a railroad corporation, one part of whose line is in a foreign country and the other in a State, from interfering with the facilities enjoyed by an express company, and from refusing to receive and transport its messengers and express matter for reasonable and just compensation over that part of the road within the State.

IN Equity.

Luke P. Poland, for orator.

W. D. Crane, for defendants.

WHEELER, J.—The principles laid down by Mr. Justice Miller in *Southern Express Co. v. St. Louis, etc., Ry. Co.*, 16 Am. & Eng. R. R. Cas. 95, must be and are fully recognized as authoritative in this class of cases. No real question is made about their general correctness. The principal controversy is in respect to their application to the circumstances of this case. The principal line of the defendants' railway, over which the orator claims the right to do express business, lies about one-fifth in Vermont and four-fifths in Canada. The part in Vermont belonged to a Vermont corporation; the part in Canada to a Canadian corporation. The Vermont corporation leased its road to the Canadian corporation for ninety-nine years, and the Canadian corporation mortgaged the whole to the defendant trustees—two of whom reside in Canada and one in Vermont—to secure mortgage bonds, and the trustees are in possession for breach of the condition of the mortgage. The other defendant is their manager of the whole. It is argued for the defendants that no relief can be granted here, because the accommodation of express companies by railroad companies in the province of Quebec, where the Canadian portion of this railroad lies, is regulated by statute, which would cut the rights of the orator down to what the defendants are willing to afford; that the court here has no jurisdiction over the enforcement of rights to accommodation on railroads in Canada; and that any attempted relief as to the part in Vermont would be ineffectual on account of the connection of that with the part in Canada, and should not be undertaken. The orator insists that the statute does not materially alter the common law as to the rights in question, and that as the relief now sought by injunction is strictly *in personam*, and the parties are now before this court, the relief may properly be granted as to the whole line, the same as if it was wholly within this territorial jurisdiction.

The statute relied upon does not appear to much, if any, vary the rules of the common law upon this subject. It merely provides that any railway company granting any facilities to any incorporated express company shall grant equal facilities on equal terms and conditions to any other incorporated express company demanding the same. St. Quebec, 43 and 44 Vict., Sec. 59, cl. 3. This is almost identical with the fifth proposition laid down by Mr. Justice Miller, except that he applies the doctrine to all engaged in express business, instead of confining it to incorporated express companies. This statute might not stand in the way of the relief claimed by the orator. There is no question but that courts of equity may and do afford relief beyond their territorial

jurisdiction by affecting the persons of parties within it, as by enforcing contracts in respect to land lying out of it. *Penn v. Lord Baltimore*, 1 Ves. 444; 2 Story, Eq. Sec. 743. But here the relief sought is not of a private character. The defendants stand upon the rights of, and are performing the duties of, a public corporation in Canada and of another in Vermont. They do not hold the property as private tenants in common, but are administering a trust involving public as well as private interests. It does not seem proper that the performance of such duties should be enforced by any but the domestic tribunals. The orator has a contract in respect to what is now asked, but an enforcement of the contract is not sought; what is sought by this bill is accommodation for express business over the defendants' road at reasonable rates. The contract is to be resorted to only as evidence of reasonableness of accommodation and rates. The subject is of such a public character, that so much of it as is without this jurisdiction is left to be dealt with by the tribunals where it is. *W. U. Tel. Co. v. Pacific Tel. Co.*, 49 Ill. 90; High. Inj. Sec. 34. The connections between the parts of the road in the different countries might render the affording of relief by the courts of the other jurisdiction as difficult alone as that of the courts here, and the same reasons that would restrain this court within this jurisdiction would restrain those within that. The presumption is that the courts there will do full and exact justice to all interests in that jurisdiction, and nothing remains to this court but to do the same, so far as they are perceived, to the interests involved within this jurisdiction.

The defendants have a contract with the Dominion Express Company for doing express business over their lines at rates greatly in excess of what the orator is paying, and greatly beyond what the orator claims to be a reasonable rate. They offered to contract with the orator upon the same terms, which the orator declined to do, for the reason, as alleged, that the rates would be ruinous; and the defendants have notified the orator to quit their lines or pay that rate. The orator has no right, and claims none, to interfere with any contract with any other company or person, but appears to have the right to have its agents and parcels transported over the defendants' road at reasonable rates, to be agreed upon by the parties or fixed by the courts. To fix an arbitrary rate, and deny all facilities except at that rate, is a denial of the right unless the rate is reasonable. The parties differ widely as to what is reasonable, and what might be quite reasonable with only one company doing the business might be very unreasonable if there were more; and what would be reasonable for the whole line might be greatly disproportionate to what would be for a part or parts only. What would be just cannot in any manner be settled in advance. The orator is entitled to the accommodation and facilities without waiting for an adjustment of the rates by

the court, by furnishing security for their payment when adjusted, by agreement, or by the court. There is no question between the parties as to the solvency of the orator, or of the surety proposed by the orator, in case one should be required.

As this subject is now viewed, in view of the case cited, and of the decisions made by the highest courts as to the duties of common carriers to carry for all at reasonable and just rates, it is considered that the orator is entitled to a preliminary injunction similar to the one granted in that case, as to so much of the defendants' road as lies within the State and district of Vermont.

Let a writ of injunction issue to restrain the defendants, their managers, agents and servants, from interfering with the facilities now enjoyed by and accorded to the orator on the railroad of the defendants within the State and district of Vermont, and from refusing to receive and transport the messengers and express matter of the orator for reasonable and just compensation therefor, to be agreed upon by the parties or adjusted by the court; the orator to be liable for all such compensation, and to file a bond in this cause in the penal sum of \$10,000, with sufficient surety, to be approved by a master within twenty days, for further security of the same.

Railroad Companies Bound to Furnish Express Facilities.—It seems to have been originally held that a railroad company is not bound to afford to express companies other facilities than those afforded to the public at large for carrying on their business. *Sargent v. Boston & L. R. Corp.*, 115 Mass. 416, and see *Camelos v. P. & R. R. Co.*, 4 Brewst. 463.

The more recent cases, however, recognize the importance of the express system to present business interests, and therefore require railroad companies to furnish express companies all reasonable facilities for the transportation of express matter. If necessary, an injunction will lie to compel the furnishing of such facilities at a reasonable rate. *Dinsmore v. Louisville, C. & N. R. Co.*, 2 Fed. Rep., 465; *Southern Express Co. v. Louisville & N. R. Co.*, 4 Fed. Rep. 481; *Express Co.'s Cases*, 3 Am. & Eng. R. R. Cas. 594; *Southern Express Co. v. Nashville, C. & St. L. R. Co.*, 20 Am. L. Reg. 590; *Wells, Fargo & Co. v. Oregon Ry. & Nav. Co.*, 16 Am. & Eng. R. R. Cas. 71; *Wells, Fargo & Co. v. Oregon Ry. & Nav. Co.*, 16 Am. & Eng. R. R. Cas. 87; *St. Louis, Iron Mt. & S. R. Co. v. Southern Express Co.*, 16 Am. & Eng. R. R. Cas. 95; *Wells, Fargo & Co. v. Northern Pacific R. Co.*, *supra*; *Baltimore & Ohio R. R. Co. v. Adams Express Co.*, *supra*.

General Reference.—For a full collection of the authorities relative to the obligations of railroad companies to express companies, see *Wells, Fargo & Co. v. Oregon Ry. & Nav. Co.*, and note, 16 Am. & Eng. R. R. Cas. 87.

STATE OF WEST VIRGINIA

v.

BALTIMORE & OHIO R. R. Co.

(24 *West Virginia Reports*, 783.)

Sections 16 and 17 of chapter 149 of the Code of West Virginia, which provide for fining any person who labors in his calling on the Sabbath day,

or employs his servants in so doing except in works of necessity or charity, and providing that there shall be excepted from the operation of this law the transportation on Sunday of the mail or of passengers and their baggage, when applied to a railroad company transporting coal or freight through this State or from this State to Maryland on Sunday, is not to be regarded as an act which regulates commerce among the several States, though it may incidentally have an effect on such inter-State commerce. It must be regarded as purely a law in reference to the internal policy of this State; and therefore it does not violate clause 3 of section 8 of article I. of the Constitution of the United States, which confers on Congress the power to regulate commerce among the several States. Such law may therefore be enforced against a railroad company engaged in such inter-State commerce.

On the trial of an indictment under this act against such a railroad company, the court below did not err in refusing to permit the following question to be propounded by the defendant to a dispatcher of trains of the defendant: "Did the defendant run out any train from Piedmont east in the month of April, 1873, or about that time, except such as were necessary?"

This is an indictment found by the grand jury of Mineral county against the Baltimore & Ohio Railroad Company for laboring in its trade and calling of common carrier on a Sabbath day, to wit, on May 27, 1873, in said county, by running over its tracks its engine and cars, the same not being used in household work or other work of necessity or charity. The case was tried at the May term, 1878, and the jury found the defendant guilty and assessed its fine at \$380, and the circuit court, in pursuance of said verdict, entered a judgment in favor of the State for that amount. The case was then taken by writ of error to this court, and on July 9, 1879, this court reversed the judgment and remanded the case for a new trial, because the verdict of the jury was not sustained by the evidence (15 W. Va. 562). The case was again tried by a jury, the trial commencing on May 18, 1880, and on May 20, 1880, the jury found the defendant guilty, and assessed its fine at \$100. A new trial was asked and refused, and judgment was rendered for the State of West Virginia against the defendant on May 22, 1880, for this \$100 and her costs. During the trial several bills of exceptions were taken by the defendant, and in one of them all the evidence given at the trial is set forth.

The State proved by two witnesses that on April 22, 1873, which was Sunday, they saw a train of fifteen or twenty cars loaded exclusively with coal pass on the defendant's railroad going eastward; and it proved by four witnesses that for many years prior to this time railroad cars loaded with merchandise and sometimes with coal alone, and often with some coal cars in the train, passed over the Baltimore & Ohio Railroad track on almost every Sunday. They were through trains, going eastward. The road leaves Mineral county and passes into Maryland about one and one-half miles eastward of Keyser, and Piedmont in Mineral county was the end of one of the divisions of this railroad. The witnesses did not know where these cars came from or where they were going to; they were apparently through trains bound for Baltimore; none of them stopped at Keyser on Sunday.

The defendant proved by its employés that its orders were to ship all coal trains from Piedmont on Saturday, and they had no recollection of ever violating these orders. At the same time these employés testified that if all the freight trains that came into the Piedmont yards on the evening and night were stopped there over Sunday, it would blockade the yard so that passenger trains could not run, and there would be great delay and confusion in starting them on Monday. The yard at Piedmont would not hold all the trains that came in on Saturday night. They testified that not many trains were run on Sundays. Trains carrying live-stock and perishable freight were run on Sunday; but cars carrying either local freight or passengers were not run on Sunday. They stated that perhaps a coal train coming in a convoy from the West might have been shipped on Sunday. The following question was propounded to a dispatcher of trains from Piedmont: "Did the defendant run out any train from Piedmont east in the month of April, 1873, or about that time, except such as were necessary?" This question was objected to by the State, and the court sustained the objection "on the ground that the question was leading, and also that it was not for the witness to decide what was necessary, but the facts on which the defendant relied to show the necessity should be proven before the jury, for it to decide whether necessary or not." To this action of the court the defendant excepted.

The defendant asked of the court these two instructions:

Defendant's instruction No. 1: "The burden is upon the State to prove to the satisfaction of the jury, not only that the said locomotive and train of cars were run on Sunday, but that there was no necessity for so running them; and if the jury are not able to find from the proof whether there was such necessity or not, they must find the defendant not guilty."

Defendant's instruction No. 2: "The burden of proof is upon the State to show that the said locomotive and train of cars were run on Sunday, and that it was not necessary to run them on that day; and in the absence of any proof showing the purpose for which they were so run, or as to when and where they were started from, or where they were destined to go, they cannot infer any one of those facts from the mere running, or that their movement on that day was not an act of necessity or charity."

The court refused to give such instruction, and in lieu thereof gave the following instruction:

"The court instructs the jury that the burden of proof is on the State to satisfy the jury that the locomotive and train of cars were not run as a work of necessity or charity, but in determining that question, the jury may take into consideration the nature of the work done, the character of the freight carried, the circumstances under which the locomotive and train were run, and all the evidence before them."

And thereupon the State asked the court to give the following instruction to the jury, viz.:

“The court instructs the jury that if they believe from the evidence, beyond a reasonable doubt, that the Baltimore & Ohio Railroad Company was found laboring at its trade or calling, that of a common carrier, within Mineral county, on a Sabbath day, within one year before the finding of the indictment against it, and that such labor was not in a work of necessity or charity, nor in the transportation of the mails nor of passengers and their baggage, then they must find the defendant guilty, although they may further believe that such labor was not on the 27th day of April, 1873.”

The defendant objected to this instruction, but the objection was overruled, and the court gave the instruction asked for by the State. To the action and ruling of the court in giving the said instruction asked for by the State, and in refusing to give the said instructions Nos. 1 and 2 asked for by the defendant, and giving said instruction in lieu thereof, the defendant objected; and this constitutes its second bill of exceptions. The defendant also asked the following instructions:

(5.) “If the jury find from the evidence that the defendant was, at the time stated in the indictment, running the said locomotive and cars by steam in transporting coal and other merchantable commodity from the State of West Virginia into the State of Maryland, it was not for this cause liable to the penalty prescribed by the laws of the State of West Virginia for Sabbath breaking or for running the said locomotive and cars on a Sunday, and they must find the defendant not guilty.”

(6.) “The court is asked to instruct the jury that so far as the State of West Virginia prohibits the defendant from operating its road on a Sunday in the transportation of coal or merchandise from the State of West Virginia into the State of Maryland, it is in contravention of the laws of the United States in relation to commerce between States, and void.”

To the giving of which instructions, or either of them, the attorney for the State objected, because neither of them correctly stated the law, and the court sustained said objection, and refused to give the said instructions, or either of them. To this ruling and judgment of the court the defendant excepted, which was his third bill of exceptions.

To the judgment of the court rendered on May 2, 1880, the defendant obtained a writ of error.

C. Boggess, for plaintiff in error.

Attorney-General Watts, for the State.

GREEN, J.—The principal question in this case is: Are Secs. 16 and 17 of Chap. 149 of the Code of West Virginia in contra-

vention of Sec. 8, Art. I. of the Constitution of the United States (see Code, W. Va. p. 8, and Sec. 5258 of Rev. Stat. of United States, title 64, p. 1017 of 2d edition, passed in pursuance of this provision of the Constitution), in so far as it interferes with the transportation of coal or merchandise by a railroad company from the State of West Virginia into Maryland on a Sabbath day, when it is shown that such transportation is neither a work of necessity nor charity, but is simply a following of its regular business on the Sabbath day as on other days? This question is raised by the fifth and sixth instructions offered by the defendant below, set out in bill of exceptions No. 3. The court below decided that this law of West Virginia was not in contravention of the Constitution of the United States or of this act of Congress, when so applied to a railroad company so transporting coal or merchandise on the Sabbath day. This decision was excepted to by the defendant in bill of exceptions No. 3. The counsel for the defendant below has argued elaborately this question, and after considering certain decisions of the Supreme Court of the United States, he draws from them these five conclusions :

" 1. *Transportation* is commerce.

" 2. *Transportation* from one State to another is commerce 'between the States.'

" 3. If *transportation* is begun in one State to be completed or ended in another, whether, by the same instrument or carrier, it is commerce 'between the States.'

" 4. Commerce 'between the States' is necessarily national in its character and *exclusively* under the control of Congress.

" 5. Non-action by Congress in regulating it is equivalent to a declaration that it shall remain *free* and *untrammelled*."

These propositions, except the fifth, are all sustained by the decisions of the Supreme Court of the United States, when applied to the transportation of merchandise or coal, which is as far as the counsel for the defendant below has in this case any occasion to contend that they are true. If not sustained fully by the decisions referred to by the counsel for the defendant below, they are abundantly sustained by other decisions of the Supreme Court and ought to be regarded as incontrovertible. But if applied to the transportation of persons, they have been controverted and regarded as not true by jurists of eminent ability, and by judges of the Supreme Court of the highest capacity. But we have no occasion to consider whether these propositions or any of them are true when applied to the transportation of persons, as this is entirely foreign to anything in the case, the transportation of coal or merchandise on the Sabbath day being alone involved in this case ; and the statute law of W. Va., Sec. 17, of Chap. 149 of Code of W. Va., page 695, expressly excepts from the operation of the law even in considering "the transportation on Sunday of the mail or of passengers and their baggage."

The fifth proposition of the counsel for the defendant below in the broad sense laid down by the counsel is not sustained by the decisions of the Supreme Court of the United States, though individual judges have used language so broad and unqualified that such an inference might be drawn. But the decision really made in the cases in which such broad and unqualified language was used do not sustain the proposition that "non-action by Congress in regulating commerce between the States in any particular matter is equivalent to a declaration that it should remain *free and untrammelled*. And therefore that any regulation of *any sort* in such a case by State legislature is null and void." There can be no doubt that, though Congress has failed to regulate commerce between the States, certain kinds of legislation by the States regulating such commerce would be null and void. But it is equally clear that certain regulations of such commerce might in the absence of legislation by Congress on the subject be enacted by State legislatures, which unquestionably would not be unconstitutional by contravening Art. I., Sec. 8, sub-division 3 of the Constitution of the United States, which gives to Congress the power "to regulate commerce among the several States."

The law is thus laid down by the Supreme Court of the United States in *Gilmore v. Philadelphia*, 3 Wall. 713: "The power to regulate commerce between the States covers a wide field and embraces a great variety of subjects, some of which will call for uniform rules and national legislation, while others can be best regulated by rules and provisions suggested by the varying circumstances of differing places, and limited in their operation to such places respectively. And to the extent required by these last cases, the power to regulate commerce between the States may be exercised by the States, so far as such legislation is not in conflict with some act of Congress passed either before or after such State legislation regulating commerce in this particular case and manner." This was decided by the court, and was not the dictum of some judge. It is true it was decided by a divided court. The decision was rendered as late as December, 1865, and merely followed a decision rendered in December, 1851, in which seven judges concurred and but two dissented (*Cooley v. Board of Wardens of Port of Philadelphia et al.*, 12 How. 299). These decisions again met the approval of the Supreme Court of the United States in *Crandall v. Nevada*, 6 Wall. 35, decided in December, 1867. The same doctrine was recognized again in *Walton v. State of Missouri*, 91 U. S. 275, and in *Henderson v. Mayor of New York*, 92 U. S. 259, and in other cases. The last to which I will refer is the *County of Mobile v. Kimball*, 102 U. S. (12 Otto.) 691. This case was decided as late as October, 1880, and was concurred in by all the judges.

The dissenting views of individual judges on which the counsel

bases his proposition No. 5 above quoted is referred to ; and Judge Field, in delivering the opinion of the entire court on page 699, says: "There have been, it is true, expressions by individual judges of this court going to the length that the mere grant of the commercial power, anterior to any action of Congress under it, is exclusive of all State authority ; but there has been no adjudication of this court to that effect." He then reviews the various decisions of the court on this subject, and reaches the conclusion, page 702, that "whether the power to regulate commerce between the States is vested exclusively in the general government depends upon the nature of the subject to be regulated." And he adds: "This may be considered as expressing the final judgment of this court." This fifth proposition of the counsel is true only in a qualified sense ; and the support of it referred to by the counsel in his argument are these ill-advised and condemned views of individual judges.

I have considered the extent to which this fifth proposition or inference of counsel is true, in order that there may be no misconception of our views.

To sustain his propositions one counsel cites the following authorities: *Welton v. Missouri*, 1 Otto, 275 ; *Lord v. Steamship Co.*, 12 Otto, 544 ; *Mobile v. Kimball*, 12 Otto, 702 ; *Railroad Co. v. Husen*, 50 U. S. 465 ; *Hall v. De Adm'r*, 5 Otto, 485 ; *Henderson et al. v. Mayor of New York*, 2 Otto, 259 ; *Case of Daniel Ball*, 10 Wall. 557 ; *Pensacola Tel. Co. v. W. Union Tel. Co.*, 6 Otto, 1. From these cases large quotations are made, but an examination of them all will show that with the exception of some loose language of individual judges or the opinions of individual judges not in consonance with the views of the court, there is nothing decided in any of these cases inconsistent with the views which I have expressed. And they render necessary some qualification of the five propositions of law deduced from them. But if they really sustained these five propositions in their broadest and most comprehensive sense, they would in no manner affect in any degree the conclusion to which I must come on the question we are considering. Admit, as is certainly true, that the transportation of coal or merchandise from West Virginia to Baltimore or from any point through West Virginia to Baltimore is commerce between the States, and that the regulation of this commerce belongs exclusively to the Congress of the United States under Art. I., Sec. 8, clause 3 of the Constitution of the United States, and that the non-action of Congress in *regulating* it is equivalent to a declaration that it shall remain *free* and *untrammelled*, thus forbids the legislature of the State to pass any laws *regulating* it in any matter or to any degree, still all this in no manner tends to show, much less does it, as assumed in the argument of counsel, prove, Secs. 16 and 17 of Chap. 149 of our Code void because

in contravention of said Constitution of the United States. That clause so far as it relates to this case is as follows: "The Congress shall have power to *regulate* commerce among the several States." The act of our legislature supposed to be in conflict with this provision of the Constitution of the United States is, so far as it relates to this case, as follows: "If a person on a Sabbath day be found laboring at any trade or calling, or employ his servants in labor or other business except in household or other work of necessity or charity, he shall be fined not less than five dollars for such offence." This act does not conflict with the provision of the Constitution of the United States above quoted, for the simple reason that the State act in no manner undertakes to regulate commerce between the States, even allowing that the Constitution of the United States confers in all possible cases and under all circumstances the exclusive *regulation* of commerce between the States on the Congress of the United States.

When this case was formerly before this court, we held that "it was obviously not intended by this act of our legislature to enforce the observance of the Sabbath as a religious duty. The legislature obviously regarded it as promotive of the mental, moral and physical well-being of men that they should rest from their labors at stated intervals; and in this all experience shows they were right." 15 W. Va. 383. The court said further: "It has been very generally held that statutes more or less resembling ours were constitutional, because they did not enforce the observance of the Sabbath as a religious duty." We concluded for this reason that our statute was not a violation of our State Constitution, and that it applied equally to individuals and to corporations. It never occurred to us to consider whether our statute violated that provision of the United States Constitution which gives to Congress the exclusive regulation of commerce between the States. And such an idea was not in any way suggested then by the counsel of the Baltimore & Ohio Railroad Company, though the case was argued elaborately and amply by him. This of itself would seem to indicate that it was a far-fetched idea, that our statute was a regulation of commerce between the States. But though it was not seen when formerly before this court, it is now insisted that it is clearly a statute regulating commerce between the States, if it be applied, as it then was, to the Baltimore & Ohio Railroad Company. This position is taken because counsel assumes that as one of the consequential effects of this statute, if applied to railroads, would be to diminish the transportation of freight on the Baltimore & Ohio Railroad, as no freight would be transported on this railroad on Sunday unless the transportation of it was a work of necessity or charity. Unquestionably this statute will have the effect of diminishing the transportation of freight over the Baltimore & Ohio Railroad on the Sabbath day; but it is well settled,

"that everything which affects commerce is not simply for that reason a regulation of it within the meaning of the Constitution of the United States." This has been repeatedly decided by the Supreme Court of the United States. Thus in the case known as the State Tax on Railway Gross Receipts or Reading Railway Company v. Pennsylvania, 15 Wall. 284, it was held: "A statute imposing a tax upon the gross receipts of railroad companies is not repugnant to the Constitution of the United States, and it is not a regulation of commerce between the States." Justice Strong, delivering the opinion of the court, says:

"No doubt any tax upon business affects the subjects and operations of commerce, yet it is not everything which affects commerce that amounts to a regulation of it within the meaning of the constitution (p. 293). * * * * That its ultimate effect may be to increase the cost of transportation may be admitted. So it must be admitted that a tax on any article of personal property, that may become a subject of commerce, or upon any instrument of commerce, affects commerce itself. If the tax be upon the instrument as a railroad car, its tendency is to increase the cost of transportation. Still it is not a tax upon transportation or upon commerce, and it has never been seriously doubted that such a tax may be laid (p. 294). * * * While it must be conceded that a tax upon inter-State transportation is invalid, there seems to be no stronger reason for denying the power of a State to tax the fruits of such transportation after they had been mingled with the general property of the carrier (the railroad company), than there is for denying the State power to tax goods which have been imported after their original packages had been broken, and after they have been mixed with the mass of personal property in the country" (p. 295).

Upon these principles the right of the State of West Virginia to tax the gross receipts of the Baltimore & Ohio Railroad Company for transportation in this State is clear, yet the greater part of those receipts is derived from the transportation of through freight products from the Western States to Baltimore, and from Baltimore either to this State or through this State to Western States. This taxation of course increases the charges made by the railroad on the goods transported from other States to or through this State. It operates indirectly as a charge on the goods transported from one State to another, yet it is no regulation of commerce. But a tax directly on the goods transported from other States to this State, or transported through this State, would be a regulation of commerce between the States, and if made by this State, would be a violation of the Constitution of the United States. For the real and prime object of the framers of the United States Constitution in giving to Congress the exclusive control of commerce between the States was to prevent the several States

from burdening the citizens of other States by laying unreasonable and unjust burdens on their goods coming into the State for sale or merely passing through the State. But the tax on the cars of the railroad or on the gross amount of their receipts produces no such ill effects, and is in fact an exercise of the *police power* of the State, which it never surrendered, and which it may exercise, though it may incidentally affect the commerce between the States. It is a misnomer to call the exercise of such *police power*, because it may or does affect inter-State commerce, a *regulation* of commerce between the States.

So in *Munn v. Illinois*, 94 U. S. R. p. 40, it was held, when a warehouse is situated within a State, the State may as a matter of domestic concern prescribe regulations for it, notwithstanding it is used as an instrument by those engaged in inter-State commerce as well as in State commerce. And though in this case the law may in its character be a regulation of commerce, until Congress acts in reference to the inter-State relations of such warehouse, such regulations can be enforced, even though they may indirectly operate on commerce beyond the jurisdiction of the State.

The *Slaughter-house Cause*, 16 Wall. 36, is another instance where a law obviously affecting inter-State commerce was held valid as a police regulation for the comfort of the people.

In *The City of New York v. Muhn*, 11 Pet. 102, a law of New York was held not in contravention of this provision of the Constitution of the United States, which provides that "every master of every vessel arriving in New York from a part of any other State is required under prescribed penalties within one day after his arrival to report in writing the names, ages and last legal settlement of every passenger." This act was decided not to be a regulation of inter-State commerce, but a police act, which the State had a right to pass as a means to prevent her being burdened with paupers. The court says, page 139: "We plant ourselves on what we consider impregnable positions. They are these: A State has the same undeniable and unlimited jurisdiction over all persons and things, within its territorial limits, when the jurisdiction is not surrendered or restrained by the Constitution of the United States. That, by virtue of this, it is not only the right but the bounden and solemn duty of the State to advance the safety, happiness and prosperity of its people, and to provide for their general welfare, by any and every act of legislation which it may deem conducive to these ends, when the power over the particular subject or the manner of its exercise is not surrendered or restrained in the manner just stated. That all those powers which relate to mere municipal legislation, or what may, perhaps, more properly be called *internal police powers*, are not thus surrendered or restrained; and consequently in relation to these, the authority of a State is complete, unqualified and exclusive. If we

were to attempt a definition of this *internal police*, we should say every law came within this description which concerns the welfare of the whole people of the State or of any individual within it, whether it related to their rights or their duties, whether it respected them as men or as citizens of the State, whether in their public or private relations, whether it related to the rights of persons or of property, of the whole people of the State or of any individual within it; and whose operation was within the territorial limits of the State and upon persons and things within its jurisdiction." Surely the law of this State fining one who employs his servants in laboring on Sunday comes within this definition of "an internal police law," which any State has a right to pass, though it does affect inter-State commerce the regulation of which belongs exclusively to Congress.

To show what is regarded by the Supreme Court of the United States as now organized as this *police power* of the State, which it has never surrendered, I will refer to the opinion of Justice Strong in the case of the Railroad Company v. Husen, 95 U. S., decided October, 1877. He says: "We admit that the deposit in Congress of the power to regulate foreign commerce and commerce among the States was not a surrender of that which may probably be denominated police power. What that power is it is difficult to define with sharp precision. It is generally said to extend to making regulations promotive of domestic order, morals, health and safety. As was said in Thorp v. Rutland & Burlington Railroad Co., 27 Vt., 149, it extends to the protection of lives, limbs, health, comfort and quiet of all persons, and the protection of all property within the State. According to the maxim *sic uteri tuo et alienum non laedas*, which being of universal application, it must of course be within the range of legislative action to define the mode and manner in which every one may so use his own as not to injure others. It was further said that by the general police power of a State, a person's own property was subjected to all kind of restraints and burdens, in order to secure the general comfort, health and prosperity of the State; of the perfect right of the legislature to do which no question ever was or upon acknowledged general principles ever can be made so far as natural persons are concerned. It may be also admitted that the police power of a State justifies the production of precautionary measures against social evils. Under it a State may legislate to prevent the spread of crime, pauperism or disturbance of the peace. It may exclude from its limits convicts, paupers, idiots and lunatics and persons likely to become a public charge, as well as persons afflicted by contagious or infectious diseases." (P. 470-471.) * * *

"Neither the unlimited power of a State tax, nor any of its large police powers, can be exercised to such extent as to work a practical assumption of the powers properly conferred upon Congress by

the constitution Many acts of a State may indeed affect commerce, without amounting to a regulation of it, in the constitutional sense of the term. And it is sometimes difficult to define the distinction between that which merely affects or influences and that which regulates or furnishes a rule of conduct."

In that particular case a law of Missouri prohibited the driving or conveying any Texan, Mexican or Indian cattle into the State of Missouri between the first day of March and the first day of November in each year and it seems to me to have been very properly held to be unconstitutional. Such a law did not come within the police power of the State, as it has been above defined and illustrated. It was not intended to promote the mental, moral and physical well-being of the people of Missouri, but it was a discrimination in inter-State commerce to the prejudice of the people of another State, and it was precisely for the prevention of such wrongs that the clause was inserted in the Constitution of the United States conferring upon Congress the exclusive regulation of inter-State commerce. See *Railroad Co. v. Richmond*, 19 Wall. 589, where Judge Fields says correctly: "The power to regulate commerce among the several States was vested in Congress in order to secure equality and freedom in commercial intercourse against discriminating State legislation." This Missouri statute was obviously intended to make just such discrimination as this constitutional provision was intended to prevent. It was clearly unconstitutional.

But how utterly different is the law of this State which we are considering. It was obviously, as we have said, when the case was formerly before us, passed for the sole purpose of promoting the mental, moral and physical well-being of our people by providing that they should rest a seventh part of their time from labor of every description, and that this rest should be at regular intervals. The legislature had no sort of purpose in so doing to regulate in any way inter-State commerce. It does not, as the Missouri statute did, propose to trammel, hinder or shackle commerce. It lays no tax on such merchandise coming into or going out of the State, as some unconstitutional laws have done. It was, it seems to me, obviously a mere police law intended simply to promote the welfare of the people of the State, and it does not operate to discriminate as against any class of persons non-residents of the State or citizens of other States. It was intended for and was only an internal policy law; and though it may have some incidental effect upon the inter-State commerce carried on by the Baltimore & Ohio Railroad Company, that fact, according to all the authorities, does not make such a law unconstitutional as regulating inter-State commerce; for it does not regulate it in the constitutional sense of this word. Many more authorities might be cited which would strengthen the views above taken, but it is

deemed unnecessary, as while the authorities show that there has been sometimes difficulty in determining whether an act of the legislature was a regulation of inter-State commerce or an internal police law, yet these cases show that where such difficulty arose, it was because of an inherent difficulty in determining what was the real object of the legislature in the passage of the act. In the case before us it is obvious that the entire object of the act was to promote the mental, moral and physical well-being of persons in this State, and though it might incidentally affect the transportation of merchandise on Sunday over the Baltimore & Ohio Railroad, yet in no case which I have seen would this incidental effect convert what was clearly a law simply of internal police into a law regulating inter-State commerce. No doubt there have been persons who would so construe this clause of the constitution giving to Congress the right to regulate inter-State commerce, that with a like strained interpretation of other general provisions in the United States Constitution, it would confer on Congress almost unlimited power of legislation, and thus change essentially the character of our government, and take by implication from the States to a great extent the power to legislate with reference to their internal affairs; but I think none have yet gone so far as to deny to the State legislature the power to pass such a law as we are discussing. If the spirit had always prevailed of giving no strained construction to the Constitution of the United States, but only such construction as it fairly bore having reference to the evils intended to be corrected by the constitution, I cannot but think that great and crying evils, the legitimate result of this mode of construing the constitution, would have been avoided.

In the present case the evil to be corrected by the giving to Congress the power to regulate inter-State and foreign commerce was, in the language of Justice Field in *Railroad Co. v. Richmond*, 19 Wall. 584, "to secure equality and freedom in commercial intercourse against discriminating State legislation." The inference to be drawn from these words of Justice Field's is, that no State legislation, which does not discriminate in favor of its own citizens or of others against the citizens of other States, and which leaves inter-State commerce free and equal, ought to be construed as violating the spirit of this provision of the constitution. If the trade of all the States be permitted to be carried on with equality and freedom, all that was intended by this provision of the constitution is accomplished, and there is no propriety in forcing a construction on this provision of the constitution so as to harass and trammel the States in legislation with reference to their internal affairs, though many laws of this character passed by them would necessarily affect inter-State commerce, but not so as to produce the inequality and discrimination intended to be

avoided by this provision of the constitution. For these reasons I am of opinion that the circuit court committed no error in refusing to grant instructions five and six set out in the third bill of exceptions.

The court did right in not permitting the defendant below to ask of its dispatcher of trains from Piedmont the question: "Did the defendant run out any trains from Piedmont east in the month of April, 1873, or about that time, except such as were necessary?" The inquiry which the jury had been sworn to try was "whether the defendant run out any trains about that time except when they were run out as a work of necessity or charity." Now, it is very obvious from the testimony in the case, that the counsel for the defendant took the position that if more trains accumulated at Piedmont on Sunday than could be accommodated on the tracks which the railroad had there, then the running out of trains from there was a work of necessity. This position was clearly answered, for it was the duty of the railroad to have tracks enough at Piedmont or where its trains stopped to enable it to run its trains in the manner required by law, that is, so as not to employ its servants in running such trains on Sunday. But propounded as this question was, the dispatcher of trains was called upon to solve the law-question, what trains it was *necessary* to dispatch from Piedmont. If he dispatched any trains from Piedmont, he should have said so, and the question asked should have been, under what circumstances they were dispatched, and it was for the jury under the instructions of the court to determine whether their dispatch on Sunday was necessary. By this question the witness was asked to perform this duty of the jury, not even furnishing them the means of knowing what his ideas of necessity were. Such evidence could have been of no possible use in eliciting the truth; and, as an answer to it would have only tended to mislead and deceive the jury, the court properly refused to permit it to be put.

The circuit court also properly refused to grant the defendant's instructions Nos. 1 and 2 set out in the second bill of exceptions, and in lieu of them properly gave the instructions, "that the burden of proof is on the State to satisfy the jury that the locomotive and train of cars were not run as a work of necessity or charity." In this respect it corresponds substantially with the two instructions asked by the defendant. And that it was right is shown by the opinion of this court in this case found in 15 W. Va. 390, and second point of the syllabus of 362. The defendant asks the court to add, that "if the jury was not able to find from the proof whether there was such necessity or not, they must find the defendant not guilty." In lieu of that the court instructed the jury, that "in determining this question, the jury must take into consideration the nature of the work done, the character of the

freight carried, the circumstances under which the locomotive and train were run, and all the evidence before them." Now, it seems to me the defendant's instruction was calculated to mislead the jury, as by it they might well have supposed they were only to look to the positive proof in the case bearing directly on this point. To prevent this misleading, the court properly changed the instruction so as to inform the jury that in reaching their conclusion as to whether the running of a train on Sunday was necessary, they should look not only to the positive evidence on the point, but also to the circumstantial evidence, which evidence was strong to show that the running of the train on Sunday was neither a work of necessity nor of charity. The latter part of the second instruction of the defendant it would have been improper for the court to give, as it would have been an unwarrantable interference by the court with the province of the jury. This part of the instruction was in the following words: "In the absence of any purpose for which said trains were run, or as to when and where they were started from, or where they were destined to go, they cannot infer any of these facts from their mere running, or that their movement on that day was not an act of necessity or charity." It would be improper for the court in any case to tell a jury what facts they could or could not infer from other facts proven, nor could the court properly tell the jury whether they could or could not draw an inference that the work was not a work of necessity or charity from certain facts. These inferences were all matters which the jury alone unaided by the court should draw; they were inferences of fact, and the court cannot properly undertake to tell a jury what weight they should give to any legitimate fact proven to them. They should give to it such weight as men of common sense would deem it entitled to, and draw from any facts such inference of other facts as they, as men of common sense, think ought to be drawn. *State v. Thompson*, 21 W. Va. p. 741. The court in the instruction it gave properly avoided this blunder, leaving the jury to draw its own inference, and merely telling them they would, in doing so, consider the circumstantial as well as the positive proof. From what was said by this court, when this case was formerly before the court, and from the general statement of the evidence we have given, it is obvious that if the jury believed the evidence of the State, and did not put confidence in the evidence of the defendant, they were justified in rendering the verdict which they did render; for from the evidence they might justly infer that the defendant was aware that freight trains were, at and about the time that the indictment charged that the offense was committed, frequently run on Sunday, and that this had been habitually done for years, and, this being the case, they had a right to infer that this running of coal trains on Sunday was done with the approbation of the defendant. 15 W. Va. 3d point of Syll. 388.

The evidence of the defendant's witness, tending to show that these trains were not run by the authority of the defendant, is, of course, on well-settled principles, to be considered of little or no value on a motion for a new trial. We have failed to take notice of the only instruction given at the instance of the State. It was full and perfect, and in accord with the opinion of this court in this case in 15 W. Va. 362 and 392; and it was so full and perfect as to prevent any misapprehension which the jury might possibly have labored under because of the instruction given by the court to the jury being less full than it should have been, though it laid down the law correctly.

I am, therefore, of opinion that the judgment of the Circuit Court of Mineral of May 22, 1880, must be approved and affirmed; and the defendant in error must recover of the plaintiff in error his costs in this court expended and damages according to law.

Affirmed.

How Far Operation of Railroads is Infringement of Sunday Laws.—The carriage of passengers and goods by railroad companies on Sundays is, in some States, not regarded as an infraction of the Sunday laws, on the ground that it is a work of necessity and mercy. *Powhattan Steamboat Co. v. Appomattox R. Co.*, 24 How, 247; *Commonwealth v. Louisville & N. R. Co.*, 80 Ky. 291; s. c. 6 Am. & Eng. R. R. Cas. 216; *Phila., W. & B. R. Co. v. Lehman*, 6 Am. & Eng. R. R. Cas. 194.

But, according to other authorities, the operation of railroads on Sunday is clearly illegal. *Augusta & Summerville R. R. Co. v. Renz*, 55 Ga. 126; *Sparhawk v. Union Pass. R. Co.*, 54 Pa. St. 401.

Right of Passenger Injured while Traveling on Sunday to Recover Damages.—In those States where the running of railroads is considered unlawful, there is a diversity of opinion as to the right of a passenger injured while traveling on that day to recover damages. In some States it is held that he may recover. *McArthur v. Green Bay Co.*, 24 Wisc. 139; *Sanders v. Staten Island R. Co.*, 13 Abb. Pr. (N. S.) 338; *Carroll v. Staten Island R. Co.*, 65 Barb. 32; *Sawyer v. Oakman*, 7 Blatch, C. Ct. 290; *Carroll v. Staten Island R. Co.*, 58 N. Y. 126; *Etchberry v. Levielle*, 2 Hilton 40; *Mahoney v. Cook*, 26 Pa. St. 342; *Schmid v. Humphrey*, 48 Iowa, 652; *Phila. R. R. v. Towboat Co.*, 23 How. 217; *Knowlton v. Milwaukee City R. Co.*, 16 Am. & Eng. R. R. Cas. 380. In some States it is held that there can be no recovery. *Stanton v. Metropolitan R. Co.*, 14 Allen, 485; *Bucher v. Fitchburg R. Co.*, 6 Am. & Eng. R. R. Cas. 212; *Smith v. Boston R. R.*, 120 Mass. 490; *Lyons v. Desetelle*, 124 Mass. 387; *Day v. Highland St. R. Co.*, 135 Mass. 118.

And see *Feital v. Middlesex R. Co.*, 109 Mass. 398.

Repairs to Railroad Made on Sunday.—Laborers cannot be indicted for making necessary repairs to a railroad on Sunday. *Yonoski v. State*, 5 Am. & Eng. R. R. Cas. 40.

Regulation of Inter-State Commerce.—The principal case raises the novel and interesting question how far State Sunday laws, in their application to railroads carrying on inter-State commerce, are to be deemed constitutional. There are numerous cases in regard to the constitutionality of State laws regulating the rates of freight and fare on railroads engaged in such commerce. *McDuffee v. Portland & Rochester R. Co.*, 52 N. H. 530; *Messenger v. Pennsylvania R. Co.*, 36 N. J. L. 407; *Chicago & Alton R. Co. v. People, ex rel.*, etc., 67 Ill. 11; *State Tax on Railway Gross Receipts*, 15 Wall. 284; *Munn v. Illinois*, 94 U. S. 118; *Chicago, etc., R. R. Co. v. Iowa*, 18 A. & E. R. Cas.—81.

94 U. S. 155; *Peik v. Chicago & N. W. R. Co.*, 94 U. S. 164; *Hall v. DeCuir*, 95 U. S. 485; *Railroad Co. v. Husen*, 95 U. S. 465; *City of Council Bluffs v. Kansas City, St. J. & C. B. R. Co.*, 45 Ill. 388; *Carton & Co. v. Illinois Central R. Co.*, 6 Am. & Eng. R. R. Cas. 805; *People v. Wabash, etc., R. Co.*, 7 Am. & Eng. R. R. Cas. 628; s. c. 12 Am. & Eng. R. R. Cas. 10; *Rae v. Grand Trunk R. Co.*, 9 Am. & Eng. R. R. Cas. 470; *Louisville & N. R. Co. v. Railroad Comm. of Tenn.*, 16 Am. & Eng. R. R. Cas. 1; *Kaiser v. Illinois Central R. Co.*, 16 Am. & Eng. R. R. Cas. 40; *Illinois Central R. R. Co. v. Stone, et al.*, *supra*; *Hardy v. Atchison, T. & S. F. R. Co.*, *supra*; *Wells, Fargo & Co. v. Northern Pacific R. Co.*, *supra*.

In every case the prime question has, of course, been whether the legislation in question could be considered a valid police regulation, local in character, or whether, on the contrary, it was so clearly operative to regulate inter-State commerce that such an application of its terms would render it unconstitutional. The court, in the principal case, seems to have considered the act in question to be merely a local police regulation, and have decided in favor of its constitutionality on that ground. On somewhat similar grounds it has been held that State acts regulating the rate of speed of trains are constitutional, and cannot be regarded as a regulation of inter-State commerce. *People v. Jenkins*, 1 Hill, 469.

MANCHESTER, SHEFFIELD & LINCOLNSHIRE RAILWAY COMPANY

v.

DENABY MAIN COLLIERY COMPANY.

(*English Law Reports*, 12 Q. B. Division, 674.)

Sec. 90 of the English Railways Clauses Consolidation Act, 1845, provides that the tolls charged by railway companies for the carriage of goods shall be charged equally to all persons and after the same rates in respect of all goods of the same description "passing only over the same portion of the line of railway," and that no reduction or advance in any such tolls shall be made, either directly or indirectly, in favor of or against any particular person using the railway. A railway company carried coals to a point upon their railway from a group of collieries placed along the line at varying distances from that point, and charged tolls at one rate per ton in respect of such carriage to all the members of the group. In an action for overcharges by the owner of the colliery lying nearest to the point of carriage, held, that the company had committed a breach of the provisions of Sec. 90, which section applied notwithstanding that the termini of the transit over the company's line from the group to the point of carriage differed with respect to each colliery, and therefore that the company were liable in the action.

SPECIAL Case.

Action for the balance of an account for carriage of the defendants' coal by the plaintiffs upon their railway.

Counter-claim for overcharges and excessive and unequal rates charged by the plaintiffs, during a period of six years before the action was brought, against the defendants in respect of the carriage of the defendants' coal over the plaintiffs' railway, and over a canal belonging to the plaintiffs, whereby the plaintiffs were alleged to have unduly favored other colliery owners, and subjected the defendants to an undue and unreasonable disadvantage, con-

trary to the provisions for equality contained in the Railways Clauses Consolidation Act, 1845, Sec. 90, and the Railway and Canal Traffic Act, 1854, Sec. 2. The defendants claimed £30,000 in respect of their counter-claim, and alternatively £30,000 damages.

The action was referred to an arbitrator, with power to state a special case. For the purposes of this report, it is only necessary to state the following facts, which were set out in the case.

The defendants were colliery owners, carrying on business near Doncaster. Their colliery is situated on the line of the plaintiffs' railway and connected with it by sidings, and has no direct communication with any other line of railway.

During the period covered by the action, the plaintiffs charged one uniform set of rates per ton for the carriage of coal from about forty-eight different collieries (specified in the case and termed "the group") to a number of specified places lying eastward of those collieries, and served by the plaintiffs' railway. The rates so charged were termed the "group rates."

The defendants' colliery is the easternmost in the group, and the distance along the plaintiffs' line of railway between the defendants' colliery and the number of the group furthest from the defendants' colliery is fifteen miles.

The "group rates" comprised the rates from each of the collieries forming the group to a great number of towns and places in various parts of England. All coals going from any of the collieries comprised in the group to any of the last-mentioned towns and places must pass the defendants' colliery, and go away thence in an easterly direction. There was no "grouping" for traffic westward. Coal going to the westward from any of the collieries comprised in the group was charged differing rates according to the distance from the colliery from which it was dispatched to the place of destination. The defendants' colliery, being the furthest to the eastward of the collieries in the South Yorkshire coal field, paid the highest rates for coal going west, whilst they paid the same rates as the rest of the collieries in the group upon coal going east.

On the 26th of July, 1880, the railway commissioners, upon the application of the defendants, gave judgment prohibiting the plaintiffs from charging equal rates of carriage between the various collieries comprising the group and the places lying to the eastward to which the group rates had applied. For the purposes of the case, it was not disputed that the decision of the commissioners was right.

The plaintiffs ceased to charge the group rates from the 26th of July, 1880, and thenceforward carried coals from the various members of the group at differential rates. The rates thus established were, in respect of coal carried from the defendants' colliery, lower in every instance than the group rates.

For the purposes of the case, it was admitted that the circumstances under which payments had been made did not preclude the defendants from opening the accounts.

The defendants contended that the group rates were a violation of Sec. 90 of the Railways Clauses Consolidation Act, 1845, and of Sec. 2 of the Railway and Canal Traffic Act, 1854, and that they were entitled, under either of those enactments, to recover the difference between the amount actually paid by them for carriage of coal and the amount which would have been payable if proper differential charges had been made for carriage of coal from the different members of the group, and not only such differences, but damages for breaches of the statutory duty.

The plaintiffs contested each of the above claims.

The questions for the opinion of the court were (*inter alia*).

Did the group rates constitute a violation of the Railways Clauses Consolidation Act, 1845, Sec. 90?

If so, are the damages of the defendants for the breach of that enactment limited to the amount of overcharges (and what is the measure of such overcharges), or can general damages also be recovered?

Does an action lie for breach of the Railway and Canal Traffic Act, 1854, Sec. 2?

If so, are the damages of the defendants for the breach of that enactment limited to the amount of overcharges (and what is the measure of such overcharges), or can general damages also be recovered?

C. A. Russell (*Sir F. Herschell, S.G.*, and *Littler, Q.C.*, with him), for the plaintiffs.

Forbes, Q.C. (*Webster, Q.C.*, and *Lofthouse* with him), for the defendants.

MATHEW, J., who, after disposing of the questions raised by the first part of the special case (which questions depended mainly upon the effect of the findings of fact by the arbitrator with respect to a number of other instances of undue preference), proceeded:

The second part of the case raises the question whether the group rates constituted a breach of Sec. 90 of the Railways Clauses Consolidation Act, 1845. Our answer to that question is, that we think the group rates were a violation of Sec. 90, and that the overcharge may be recovered in accordance with *Evershed's Case*. 2 Q. B. D. 254; 3 Q. B. D. 134; 3 App. Cas. 1029. We cannot adopt the narrow construction of Sec. 90 contended for by the plaintiffs' counsel, namely, that it only applies where the *termini* of the transit correspond. In the absence of special circumstances to justify the same charge for carrying a greater distance for one customer than for another, there would appear to be that kind of

inequality which Sec. 90 is intended to prevent. In such cases part of the services to the particular customer would practically be rendered gratuitously and to the disadvantage of others. We think, therefore, that Sec. 90 applies.

We are further asked whether, if Sec. 90 applies, the defendant's damages for the breach of that section are limited to the amount of the overcharges, or whether general damages can also be recovered. To that we answer that we see in the statement of facts before us no ground upon which an action for damages would be maintainable.

Another question is, does an action lie for breach of the Railway and Canal Traffic Act, 1854, Sec. 2? We are of opinion that an action does not lie for anything done in contravention of that act. It seems conclusive from Sec. 6 that no such action can be maintained. The terms of that section are: "No proceeding shall be taken for any violation or contravention of the above enactments except in the manner herein provided; but nothing herein contained shall take away or diminish any rights, remedies, or privileges of any person or company against any railway company under the existing law." The present action is brought to recover overcharges—overcharges having regard to the provisions of Sec. 2—and the ingenious suggestion was made in argument that an action in respect of such overcharges was not an action for anything done in contravention of the statute, but an action for the detention of money. But the money would be properly charged and properly detained if it were not for the prohibition contained in the act. It is, therefore, perfectly clear that in substance the action is brought for something done in contravention of the act. We were much pressed in argument with *Evershed's case*, which was treated as a decision that an action would lie for breach of the provisions of Sec. 2 of the Railway and Canal Traffic Act. With reference to that case, it is only necessary to say that, whatever the language in some of the judgments may be, the point was not presented to the court, and no opinion was expressed upon it. The judgment was, that the provisions of Sec. 90 of the Railways Clauses Consolidation Act, 1845, had been violated, and that an action would lie in respect of that violation. We are fortified in our view that an action will not lie for a breach of the Railway and Canal Traffic Act by the judgment of Pollock, B., which we have had an opportunity of examining, in the unreported case of *Denaby Main Colliery Co. v. Manchester, Sheffield & Lincolnshire Ry. Co.*

Judgment accordingly.

Unjust Charges and Discriminations.—As to the law on this subject, see *People v. St. Louis & Cairo R. R. Co.*, and note, *infra*.

Unjust Discrimination Illegal.—In the United States, independent of statutory provision, the making of unjust discriminations in the rates of freight on a railroad is illegal. *Messenger v. Pennsylvania R. R. Co.*, 86 N.

J. L. 407; *Hays v. Penna. R. R. Co.*, 12 Fed. Rep., 309; *Cumberland Valley R. Co.'s Appeal*, 62 Pa. St. 218; *Vincent v. Chicago & Alton R. R. Co.*, 49 Ill. 88; *Houston, etc., R. Co. v. Rust.*, 9 Am. & Eng. R. R. Cas. 123; *Regan v. Alkens*, 9 Am. & Eng. R. R. Cas. 201.

See further, *Atchison, T. & S. F. R. Co. v. Denver & New Orleans R. R. Co.*, 9 Am. & Eng. R. R. Cas. 374; 12 Am. & Eng. R. R. Cas. 1; 16 Am. & Eng. R. R. Cas. 57.

See also the following cases which depend on the same principle: *Southern Express Co. v. St. Louis, etc., R. Co.*, 10 Fed. Rep., 210, 869; 3 Am. & Eng. R. Cas. 594; *Texas Express Co. v. Tex. & Pac. R. Co.*, 6 Fed. Rep., 426; *Southern Express Co. v. Memphis, etc., R. Co.*, 18 Cent. L. J. 68; *Sandford v. Railroad Co.*, 24 Pa. St. 348; *New Eng. Express Co. v. Maine Cent. R. Co.*, 57 Me. 188; *McDuffee v. Portland & R. R. Co.*, 52 N. H. 430; *Chicago & N. W. R. Co. v. People*, 56 Ill. 465; *Denver, etc., R. R. Co. v. Atchison, T. & S. F. R. Co.*, 9 Am. & Eng. R. R. Cas. 374; *Wells, Fargo & Co. v. Oregon R. & N. Co.*, 16 Am. & Eng. R. R. Cas. 87.

Statutes Prohibiting Unjust Discrimination Constitutional.—In almost all of the States statutes have been passed regulating the rate of freight and fares, and prohibiting unjust discriminations. It has been repeatedly determined that the legislatures have a constitutional right to pass such statutes. *Blake v. Winona & St. Peter R. Co.*, 19 Minn. 418; *Beekman v. Saratoga & Schenectady R. Co.*, 3 Paige Ch. 45; *State v. Winona & St. Peter R. Co.*, 19 Minn. 434; *Fuller v. Chicago & N. W. R. Co.*, 31 Iowa, 188, 211; *Railroad Co. v. Fuller*, 17 Wall. 560; *Hudson County v. State*, 4 Zab. 718; *McGregor v. Erie R. Co.*, 6 Vroom, 89; *Ruggles v. Illinois*, 91 Ill. 257; *Illinois Central R. Co. v. People*, 95 Ill. 818; *Tilley v. Savannah, etc., R. Co.*, 5 Fed. Rep., 641; *People v. Wabash, etc., R. Co.*, 7 Am. & Eng. R. R. Cas. 628; *Wabash, etc., R. Co. v. People*, 12 Am. & Eng. R. R. Cas. 10; *Louisville & N. R. Co. v. Railroad Comm.*, 16 Am. & Eng. R. R. Cas. 1.

WATERMAN

v.

CHICAGO, M. & ST. P. RY. CO.

(*Advance Case, Wisconsin, November 25, 1884.*)

One with whom a contract for the carriage of goods is made, and who is described therein as the consignor, consignee, and sole owner, may maintain an action to recover an overcharge exacted by the carrier as a condition of the delivery of the goods, although he was not, in fact, the owner, and did not personally furnish and pay the overcharge. The plaintiff in such case is "a trustee of an express trust," within the meaning of Sec. 2607, Rev. St. of Wisconsin.

APPEAL from Circuit Court, Walworth county.

On or about February 2, 1880, in consideration of ninety dollars then paid, the defendant, at Darien, Wisconsin, agreed with the plaintiff in writing to transport one car-load of goods, consisting of household goods, farming implements, one pair of horses, and some lumber, described therein as the property of the plaintiff, from said Darien to Plum Creek, in the State of Nebraska. The writing recited that the property was received of the plaintiff at the former place, and consigned to him at the latter place. As a part

of the contract, the plaintiff therein released the defendant from certain liabilities, and was to and did accompany the property; and for that purpose was to and did receive a free pass from the defendant. When the car reached Plum Creek, the railroad company having the same in charge refused to deliver the property to the plaintiff unless he would pay an extra charge of \$32.28 over and above that already paid, as expressed in the contract, as freight, and in compliance with that exaction the same was then and there paid, and the property delivered to the plaintiff, and this action is to recover back the amount of such excessive charge so exacted and paid. It appears, as a matter of fact, that the property belonged to Charles Nowlan; that the negotiations for the carriage were conducted by his brother, O. F. Nowlan; that the agreed freight (ninety dollars) was paid by Cheesbro, the father-in-law of Charles Nowlan; that at the time of the loading of the car Cheesbro started to sign the contract in behalf of Charles Nowlan, when the defendant stopped him, and insisted that, as the plaintiff was to accompany the goods and receive them at Plum Creek, he should execute the contract, which he accordingly did, and that recited that the ninety dollars was received of Cheesbro for the plaintiff. It further appears that the amount of the extra charge exacted at Plum Creek was, in fact, furnished and paid by Charles Nowlan in the presence and with the consent of the plaintiff. The answer consists of a general denial merely. Upon the trial the jury found for the plaintiff, and assessed his damages at the amount of such excessive charges and interest, and from the judgment entered thereon this appeal is brought.

S. W. Menzie and A. S. Spooner, for respondent.

Fuller & Fuller and Burton Hanson, for appellant.

CASSODAY, J.—Notwithstanding the plaintiff is described in the contract of carriage as consignor, consignee and sole owner, yet the defendant seeks to escape liability for the repayment of the excessive exaction on the sole ground that the plaintiff was not the owner of the property, and did not personally furnish and pay the overcharge. Is such a defence available? The question has elicited much discussion, and the adjudicated cases upon it present a considerable disagreement. We make no attempt to reconcile an irreconcilable conflict. It is enough to know that our conviction as to the law applicable has the sanction of respectable authority, and especially under our statute as it has been construed by this court. The question is not whether the owner could have maintained the action, for he did not bring the action. There seems to be no dispute that, where there is nothing appearing to the contrary, the consignee is presumed to be the owner of the property, and as such may maintain an action for its loss or depreciation in value by reason of the negligence of the carrier.

Undoubtedly this presumption may be overcome by evidence. A consignor may have a right of action against the carrier by reason of ownership. So he may have such right of action on privity of contract. The contract seems to be controlling, at least to a certain extent, in all cases. *Evans v. Marlett*, 1 Ld. Raym. 271; *Davis v. James*, 5 Burr. 2680; *Mason v. Lickbarrow*, 1 H. Bl. 357; *Moore v. Wilson*, 1 Term R. 659; *Joseph v. Knox*, 3 Camp. 320; *Dunlap v. Lambert*, 6 Clark & F. 600; *Freeman v. Birch*, 3 Q. B. 492; *Blanchard v. Page*, 8 Gray, 281; *Finn v. Railroad Co.*, 112 Mass. 524; *Carter v. Graves*, 9 Yerg. 446; *Northern Line Packet Co. v. Shearer*, 61 Ill. 263; *Southern Exp. Co. v. Craft*, 49 Miss. 480. A careful analysis of these cases will be found in a well-written article by Judge Pierce, of Tennessee, in 7 South. Law Rev. (N. S.) 255-283.

It appears that much depends upon the nature of the act complained of and the character of the action. Thus, in *Carter v. Graves*, *supra*, it was said "that, in all actions on the case against a carrier for a loss or injury done to property, the wrong is the gist of the action, and the contract to deliver collateral to it. In all actions of *assumpsit* for not delivering according to contract, the contract to deliver is the gist of the action, and the loss or injury sustained is collateral thereto." In several of the cases above cited, an action for the breach of the contract was maintained by a party to the contract having no ownership or interest in the property carried. Thus, in *Joseph v. Knox*, *supra*, the plaintiffs had no ownership or interest in the goods, but, as shippers, were parties to the contract, and it was held that they might maintain the action upon the bill of lading for the failure to carry and deliver. Lord Chief Justice Ellenborough observed that "there is a privity of contract established between these parties by means of the bill of lading. That states that the goods were shipped by the plaintiffs, and that the freight for them was paid by the plaintiffs in London. To the plaintiffs, therefore, from whom the consideration moves, and to whom the promise is made, the defendant is liable for the non-delivery of the goods. After such a bill of lading has been signed by his (the carrier's) agent, he cannot say to the shippers they have no interest in the goods, and are not damnified by his breach of contract. I think the plaintiffs are entitled to recover the value of the goods, and they will hold the sum recovered as trustees for the real owner."

So in *Hooper v. Railway Co.*, 27 Wis. 91, it was said that "the shipper is a party in interest to the contract, and it does not lie with the carrier who made the contract with him to say, upon a breach of it, that he is not entitled to recover the damages unless it be shown that the consignee objects; for without that it will be presumed that the action was commenced and is prosecuted with the knowledge and consent of the consignee, and for his benefit. The

consignor or shipper is, by operation of the rule, regarded as a trustee of an express trust, like a factor or other mercantile agent who contracts in his own name on behalf of his principal." Here the defendant contracted solely with the plaintiff. In the contract the defendant, with full knowledge of the facts, recognized the plaintiff as sole owner of the property. The freight had been fully paid in behalf of the plaintiff. To him the defendant, in consideration of such payment, expressly agreed to deliver the property at the place of consignment. This express agreement was broken by the refusal to so deliver except upon condition of a further payment of an unauthorized exaction. This unauthorized exaction was complied with when the delivery was made. Having broken the contract, and received the overcharge in consequence of the breach, the defendant seeks to escape liability for the breach on the ground that the only party with whom it contracted was not in fact the owner of the property, and did not personally furnish and pay the overcharge exacted as a condition of the delivery. To hold such a defence available would, in effect, abrogate an express written contract. One exception to the statutory rule that "every action must be prosecuted in the name of the real party in interest" (Sec. 2605), is that "a trustee of an express trust * * * may sue without joining with him the person for whose benefit the action is prosecuted." Sec. 2607. "A trustee of an express trust, within the meaning of this section," must "be construed to include a person with whom, or in whose name, a contract is made for the benefit of another." *Id.* By amendment these provisions have been made applicable to actions brought in justice court, as this was. Subdiv. 27, Sec. 2, Chap. 194, Laws 1879. If the consignor or shipper could properly be "regarded as a trustee of an express trust" under this statute, as held in *Hooper v. Railway Co.*, *supra*, then certainly the person described in the contract as consignor, consignee and sole owner, and for whom the freight has been paid, must also be regarded as a trustee of an express trust under the statute. *Allen v. Kennedy*, 49 Wis. 549.

The judgment of the circuit court is affirmed.

General References.—As to the construction of statutes forbidding excessive freight charges and the right to recover back the excess paid, see *Lotspeich et al. v. Central R. & B. Co. of Ga.*, and note *infra*; and *Peters, Ricker & Co. v. Marietta & Cincinnati R. Co.*, and note *infra*.

LOTSPEICH *et al.**v.*

CENTRAL RAILROAD & BANKING COMPANY OF GEORGIA.

(78 *Alabama Reports*, 306.)

The rate on freight carried over the whole line of a railroad company, which furnishes the basis for the additional fifty per cent. allowed by the act of the General Assembly of Alabama, approved April 19th, 1873, for the transportation of "local freight," is the rate charged on freight taken on at one terminus, and discharged at the other; and not the rate for freight brought from or carried to a point beyond either terminus of the road.

While a railroad company may give a bill of lading to deliver freight at a point beyond its line, which binds the company for safe delivery at the agreed point of destination, this is simply a matter of agreement between the shipper and the company, in the absence of which the company is not liable for a loss occurring after the freight has passed beyond its line; and the company cannot be compelled to give such a bill of lading.

Where, in an action against a railroad company by a shipper, to recover the excess of charges on cotton shipped by him over and above what was reasonable, the only testimony bearing on the question of the reasonableness of the charges paid by him was, that the rates of freight on compressed cotton shipped from Montgomery or Selma, were about fifty per cent. in excess of the rates paid by him on uncompressed cotton shipped from Opelika, a point sixty-six miles less in distance than Montgomery, and 116 miles less in distance than Selma, from the terminus of the road to which the cotton was shipped, it being common knowledge that compressing cotton bales reduces their bulk about one-half, the testimony was wholly insufficient to furnish a basis for determining the reasonableness of the charges; and hence the primary court did not err in refusing to submit that question to the jury.

APPEAL from Lee Circuit Court.

This action was brought by Lotspeich & Ponder against the Central Railroad & Banking Company of Georgia, and the Georgia Railroad & Banking Company, corporations owning and operating, as is averred, a railroad from Selma, Alabama, to the State line between Alabama and Georgia, and was commenced on 9th April, 1878. The complaint contains several counts, one being for money had and received by the defendants to the plaintiffs' use, and the other seeking to recover the penalty allowed by the act of the General Assembly approved April 19th, 1873, for excessive charges on cotton shipped by the plaintiffs on the defendants' railroad. The facts disclosed by the record, so far as is necessary to an understanding of the points decided, are sufficiently stated in the opinion. The court charged the jury, at the written request of the defendants, that, if they believed the evidence, they must find for them, and the plaintiffs excepted. This charge is here assigned as error.

Wm. H. Barnes, for appellants.
Geo. P. Harrison, Jr., contra.

STONE, J.—In *Mobile & Montgomery Railroad Co. v. Steiner & McGehee*, construing the act of April 19th, 1873, we said: "The rate on freight '*carried over the whole line of its road*,' which furnishes the basis for the additional fifty per cent. allowed by that act for the transportation of 'local freight,' is the rate charged on freight taken on at one terminus, and discharged at the other, and not the rate for freight brought from or carried to a point beyond the *termini* of the road." 61 Ala. 559. We are asked to review and reverse that ruling. Nothing has occurred to change our opinion then expressed, while the facts of this case tend to confirm the conclusions we then announced.

It is further contended for appellants that the charges made and collected by the railroad in this case were unreasonable, and therefore they ought to recover back the excess, as so much money had and received. And it is claimed that this question should have been submitted to the jury, for them to determine whether or not the charges were reasonable.

The testimony bearing on this question is clear and without conflict. There was, in fact, no question of local freight in the case. All the cotton shipped, excessive transportation charges on which are complained of, was consigned to points hundreds of miles beyond the terminus of the railroad, whose bill of lading was taken. Bills of lading by railroad companies are frequently given, binding the company to deliver at a point beyond their line. Such bills bind the company for safe delivery at the agreed point of destination. *M. & G. Railroad Co. v. Copeland*, 63 Ala. 219. This, however, is a question of contract; and in the absence of a special contract to deliver, the receiving railroad is not liable for a loss or injury occurring after the freight has passed from its line. Nor can a railroad corporation be compelled to give a bill of lading for delivery beyond its line. It is simply a matter of agreement between the shipper and the receiving road. The only testimony bearing on the question of reasonableness in the charges is as follows: From the various points to which cotton, shipped over defendants' road and its connections, was consigned, the distance to Montgomery, Alabama, was sixty-six miles greater than the distance to Opelika, from which last point plaintiffs did their shipping. The distance to Selma was fifty miles greater than that to Montgomery. The shipping rates from Opelika were about fifty per cent. in excess of those charged from Montgomery and Selma. But cotton shipped from the last two points was always compressed, while that shipped from Opelika was not compressed. It is common knowledge that compressing cotton bales reduces their bulk probably one-half. What would have been the rate of

non-compressed bales from Selma or Montgomery is nowhere shown. No testimony was produced at all calculated to furnish a basis for determining the reasonableness of the charges; and hence nothing was before the jury to justify the court in submitting that question to them.

We find no error in the record, and the judgment of the circuit court must be affirmed.

Construction of Statutes Prohibiting Overcharges in Freight.—In almost all of the States laws have been passed prohibiting railroad companies from charging excessive rates of freight and fare. As to the construction of such acts which generally provide for a penalty in case of their violation, and permit a recovery of the excess paid, see the following authorities: *Fuller v. Chicago & N. W. R. Co.*, 31 Iowa 187; *Streeter v. Chicago, M. & St. P. R. Co.*, 40 Wisc. 294; *Fisher v. New York Central & H. R. R. Co.*, 46 N. Y. 644; *Smith v. Chicago & N. W. R. Co.*, 43 Wisc. 686; s. c. 1 Am. & Eng. R. R. Cas. 303; *Moore v. Illinois Central R. Co.*, 68 Ill. 385; *Knight v. Southern Pacific R. Co.*, 41 Tex. 406; *Graham v. M. C. & St. P. R. Co.*, 53 Wisc. 473; s. c. 3 Am. & Eng. R. R. Cas. 289; *Rogan v. Aiken*, 9 Am. & Eng. R. R. Cas. 201; *Harriman v. Burlington, etc., R. Co.*, 9 Am. & Eng. R. R. Cas. 339; *Heiserman v. Burlington, C. R. & N. R. Co.*, 16 Am. & Eng. R. R. Cas. 46; *Steever v. Illinois Central R. Co.*, 16 Am. & Eng. R. R. Cas. 53.

Statutes Prohibiting Overcharges in Freight under Penalty are Constitutional.—Such statutes are constitutional, and are not in derogation of charters previously granted to specific companies. *Georgia R. & B. Co. v. Smith*, 9 Am. & Eng. R. R. Cas. 385; *Ruggles v. People*, 11 Am. & Eng. R. R. Cas. 49; *Illinois Central R. R. Co. v. People*, 11 Am. & Eng. R. R. Cas. 55; *Louisville & N. R. Co. v. Railroad Commissioners of Tenn.*, 16 Am. & Eng. R. R. Cas. 1.

Recovery of Excess in Charge for Freight.—As to the right to recover back the amount paid in excess of the legal freight, see *Waterman v. Chicago, M. & St. P. R. Co.*, *supra*; and *Peters, Ricker & Co. v. Marietta & Cinn. R. Co.*, and note, *infra*.

PETERS, RICKER & Co.

v.

MARIETTA & CINCINNATI R. R. Co

(*Advance Case, Ohio, Oct. 21, 1884.*)

Whether the rate of freight fare fixed by a railroad company, under Sec. 12 of the Ohio act of February 11, 1848 (S & C. 271), for distances less than thirty miles, be reasonable or not, is a question of fact to be determined by the circumstances of each case.

A shipper has a right to have his goods transported at legal rates over the usual line of a common carrier of such goods; and if to procure the services of such carrier, the shipper is compelled to pay illegal rates established by the carrier, the payment is not such a voluntary payment as will preclude recovering back the illegal charge; nor will it preclude such recovery if the payments, by arrangement of parties, are made at the end of each month.

ERROR to the District Court of Scioto county.

This case is one of twelve cases, each of which has similar facts and questions of law.

The plaintiffs owned iron blast furnaces for the manufacture of pig iron, and the furnaces were located along the line of the Scioto & Hocking Valley Railroad, between Portsmouth and Hamden. All but five were built after the construction of the road, and after that time all the furnace companies exclusively relied upon it for transportation.

This part of the S. & H. V. R. R. was purchased about Dec. 1, 1863, by the defendant and possession taken. By the act of Feb. 11, 1848 (S. & C. 271), the S. & H. V. R. R. Co. was limited in its rate of charges for the transportation of freight to five cents per ton per mile, as a maximum charge for distances of thirty miles or more, and for distances of less than thirty miles, to "reasonable rates." This limitation was not on the defendant as to its original road, but it might charge for the transportation of property "such rates of toll as the corporation may determine."

After this purchase the defendant claimed the right to charge the same rates over the purchased road that were charged over its own road, and advanced the rates under dates of January 26, 1864, March 7, 1864, March 28, 1864, Aug. 1, 1864, Sept. 12, 1864, Dec. 12, 1864, and March 16, 1865. This caused objection and remonstrance, and in 1867 the suits were commenced.

The petition further avers that plaintiffs were entitled to have their freight carried at rates limited to be charged by the S. & H. V. R. R. Co., but that the defendant has disregarded plaintiffs' rights and has taken advantage of plaintiffs' necessities, and has required unlawful and unjust rates, which plaintiffs have been compelled to pay by the necessities of their business, and that plaintiffs remonstrated against the unjust exactions and protested against the payment of the same, and that the defendant, although requested so to do, has neglected and refused to account with the plaintiffs as to the payments in excess of legal rates, and that defendant has so received to and for the use of the plaintiffs the several sums of money set forth in the exhibit, and prays judgment.

The answer has three defences: The *first* denies that the defendant is restricted in charging freight and fare to the charter of the S. & H. V. R. R. Co., and claims, as purchaser of that road, to be authorized to charge any "fair and reasonable rates;" the *second* alleges that all sums paid were so paid voluntarily, after the services for which the same were demanded had been fully rendered, and when defendant's demand for the same could not have been enforced without giving plaintiffs a day in court, with full knowledge, or the means of knowledge, of the change in the ownership of said railroad, and of the charges demanded by the defendant for the transportation of the property upon its said purchased

road, and of all other facts connected with said demand; and that said sums were not exacted as a condition of the performance of said service, nor as an inducement of such performance; and denies all allegations which charge that the same were paid involuntarily or by coercion; and the *third* denies that the sums charged were in excess of amounts authorized by the charter of the S. & H. V. R. R. Co., and says the charges so made included compensation for warehouses, grounds, and facilities furnished, storage, handling, etc.

The reply to the *first defence* denies that, as purchaser of the said road, the defendant has any other right or power to charge fare or freight otherwise than as prescribed for the original owner, the S. & H. V. R. R. The reply to the *second defence* denies that the payments were voluntary, and avers that they were coerced and illegally exacted by defendants. The reply to the *third defence* denies defendant's right to charge for anything but transportation.

The defendant demurred to the first defence. The demurrer was sustained in the court of common pleas and in the district court, and came to this court on the question whether the M. & C. R. R. Co. is restricted on this purchased branch in charging for freight; and the judgment below was reversed for error in sustaining the demurrer. *Campbell v. M. & C. R. R. Co.*, 23 Ohio St. 168. This court held that Sec. 12 of the act of Feb. 11, 1864, applied to this case, and sent it back to the court below for further proceedings.

The cases were then sent to a special master to take testimony and report. The master took the evidence and reported it, and found and reported certain rates "to be reasonable rates for the distances named during the period covered by the report;" and that, from and after March 28, 1864, the defendant had charged plaintiffs rates in excess of legal rates allowed by the charter of the S. & H. V. R. R., and that from March 28, 1864, to February 1, 1867, the plaintiffs paid defendant excessive and illegal charges, and "that the payment of such excess was compulsory in the sense that plaintiffs and defendant did not stand on a footing of equality, that said sums exacted were illegal and unauthorized, and that plaintiffs were required to pay the same to procure the transportation of their property, without which the plaintiffs in each of said cases, by reason of their manufacturing business, would have suffered great loss."

The court of common pleas, from the report and evidence, also found "that said payments in excess of rates authorized by law, and inclusive of interest to the first day of the present term, amount to the sum of \$——, but that the payments were voluntarily made, and under such circumstances that they cannot be recovered back;" and rendered judgment for the defendant.

Plaintiffs excepted, and the cases are here on their bill of exceptions.

Edward F. Hunter, W. A. Hutchins and M. A. Daugherty, for plaintiff in error.

McClintick & Smith and Harrison, Olds & Marsh, for defendant in error.

FOLLETT, J.—The plaintiffs aver that the defendant, from time to time, has received to and for the use of the plaintiffs several sums of money, specified and set forth in tabular statements; and that the several sums so received were for freight charges in excess of legal rates. It is admitted that the amounts charged were paid.

The matters set up in the first defence were disposed of by this court in *Campbell v. M. & C. R. R. Co.*, 23 Ohio St. 168, by holding: "Where the railroad of one company is purchased by another railroad company, in pursuance of a statute authorizing the purchase, in the absence of any provision of law to the contrary, the road passes to the purchasing company, subject to the same restrictions and limitations as to rates chargeable for transportation, as attached to it in the hands of the vendor." And Sec. 12 of the act of February 11, 1848, governs this case.

In that case this court also held that: "Where a railroad company is authorized to demand and receive compensation for transportation of property 'not exceeding five cents per ton per mile, where the same is transported a distance of thirty miles or more, and in case the same is transported for a less distance than thirty miles, such reasonable rate as may be from time to time fixed by the company,' it is unreasonable, as a matter of law, that the company should fix a greater sum for a less distance than thirty miles than the maximum allowed for full thirty miles."

In *Smith v. P., Ft. W. & C. Ry. Co.*, 23 Ohio St. 10, this court also held: "Whether the rate of *passenger* fare fixed by a railroad company under Sec. 12 of the act of February 11, 1848 (S. & C. 271), for distances less than thirty miles, be reasonable or not, is a question of fact for the jury, to be determined under such instructions by the court as the circumstances of the particular case may require."

In that case, McIlvaine, J., said: "Whenever, therefore, the determination of the question, whether the rate be reasonable, involves the necessity of hearing testimony, it falls within the province of the jury." We think the reasonableness of *freight* fare may be determined by the same manner.

In this case the special master heard the testimony and found the facts, and also reported the evidence, and from the peculiar facts of the case, the master found a certain amount due for "the payments in excess of rates authorized by law;" and the court

below, from the same evidence, found the same facts, and added interest to that amount, and found a definite sum. These findings seem conclusive; and, whether or not these particular findings be before this court for review, the majority of the court think there was no error in finding that such payments were for charges in excess of rates authorized by law. The defendant should have known what were legal rates, and should have charged no more.

The plaintiffs have paid to defendant these illegal charges—money unjustly obtained; and the remaining question is, can the plaintiffs recover back the same?

The defendant denies the plaintiffs' right to recover back, on the ground that these illegal charges "were so paid *voluntarily* after the services for which the same were demanded had been fully rendered and performed," etc.

The plaintiffs paid the charges for each month at the end of the month, and as the plaintiffs and defendant did not stand on terms of equality, they so paid to secure transportation for the succeeding month. The defendant prescribed its own rates, and would carry the plaintiffs' freight only at the established rates, though these rates were illegal and unreasonable, and when, as a common carrier, it should have carried this freight at legal rates. The special master found that "the sums exacted were illegal and unauthorized, and plaintiffs were required to pay the same for the transportation of their property, without which the plaintiffs in each of said cases, by reason of the character of their manufacturing business, would have suffered great loss."

The defendant did not require the payments to be made in advance of carrying each shipment of freight, but the charges of each month were required to be paid at the end of the month or future freight would not be carried.

Plaintiffs could *compel* the defendant to carry their freight only by a resort to the courts and at the end of litigation. The history of these suits begun in 1867, and, just ending in 1884, shows that plaintiffs could not obtain *speedy* and *adequate* redress—such as would save their business and prevent loss—simply by a resort to the courts to enforce legal rights. And as defendant would not accept the payment of legal rates, and required the full payment of its illegal charges, the plaintiffs, complaining and objecting to the increased and illegal charges, were forced to pay them. Their choice and volition were compelled. Such payments are not voluntary.

We will refer to some authorities and reasons of this position. "The common principle is, that if a man chooses to give away his money, or to take the chance whether he is giving it away or not, he cannot afterward change his mind; but it is open to him to show that he supposed the facts to be otherwise, or that he really

had no choice." Pollock's Principles of Contract, 523. These plaintiffs "really had no choice." In 1760, in *Moses v. Macfarlan*, 2 Burr. 1005, Lord Mansfield said, "This kind of equitable action, to recover back money, which ought not, in justice, to be kept, is very beneficial, and therefore much encouraged. It lies only for money which, *ex æquo et bono*, the defendant ought to refund; * * But it lies for * * money got through * * an under advantage taken of the plaintiffs' situation, contrary to laws made for the protection of persons under those circumstances." The plaintiffs paid this money in like situation.

In *Parker v. Great Western Ry. Co.*, M. & Gr. 253, the court held that payments made to a common carrier to induce it to do what by law, without them, it was bound to do, were not voluntary, and might be recovered back. Addison on Contracts, Sec. 1043, approves this principle. Mr. Justice Matthews, in *Swift Co. v. United States*, 111 U. S. 29, approves the doctrine, and calls it a "wholesome principle." And in *Baker v. City of Cincinnati*, 11 Ohio St. 558, Gholson, J., approves the same authority. In *Maxwell v. Griswold*, 10 How. 242, the court said: "Now it can hardly be meant, in this class of cases, that to make a payment involuntary, it should be by actual violence, or any physical duress."

In case of *Railroad Co. v. Lockwood*, 17 Wall. 379, Mr. Justice Bradley says: "The carrier and his customer do not stand on a footing of equality. The latter is only one of a million. He cannot afford to higggle or stand out and seek redress in courts. His business will not admit of such a course. He prefers rather to accept any bill of lading, or sign any paper the carrier presents; often, indeed, without knowing what the one or the other contains. In most cases he has no alternative but to do this, or abandon his business."

In *Beckwith v. Frisbie*, 32 Vt. 559-566, it was said, "To make the payment a voluntary one, the parties should stand upon an equal footing."

This is not a case of individuals dealing with each other on terms of equality; nor a case of payment of illegal charges to obtain possession of property; nor payment of illegal taxes to prevent the sale of property. *Here* the defendant was a common carrier of such freight as plaintiffs had for transportation; the State had given the defendant, through its purchase of this part of its road, its right to use this road, and had limited its rate of charges. The plaintiffs' business was dependent on transportation by the defendant, and they were entitled to have their freight carried at legal and reasonable rates. The defendant prescribed rates illegal and unreasonable, and required its agents to demand and receive such rates, or not to carry the freight. Plaintiffs, objecting and protesting against the basis and the amount of the

charges, paid them at the end of each month, and they so paid the illegal charges to procure the future transportation of their freight.

The case of *Swift Co. v. United States*, 111 U. S. 22, is very much like this. There the commissioner of internal revenue had acted upon a wrong basis in charging stamps for friction matches. The Swift Co. gave orders for stamps, and paid for each purchase within sixty days from the delivery of the stamps, and thus dealt from 1870 to 1878. No protest had been made by the company, though years before, in 1866, a member of the company "made repeated protests to the officers of the Internal Revenue Bureau against the methods of computing commissions," in similar cases.

The court held: "A course of business and a periodical settlement between the commissioner of internal revenue and a regular periodical purchaser of revenue stamps, entitled by statute to commission on his purchases, payable in money, which shows that the commissioner asserted and the purchaser accepted that the business should be conducted upon the basis of payments of the commissions in stamps at their par value instead of in money, does not preclude the purchaser from asserting his statutory right, if he had no choice, and if the only alternative was to submit to an illegal exaction, or discontinue his business." And the court also held: "When the commissioner of internal revenue adopted a rule of dealing with purchasers of stamps, which deprived them of a statutory right to be paid their commissions in money, and obliged them to take them in stamps, and made known to those interested that the rule was adopted and would not be changed, the rule dispensed with the necessity of proving, in each instance of complying with it, that the compliance was forced."

Mr. Justice Matthews said: "No formal protest, made at the time, is, by statute, a condition to the present right of action, as in cases of action against the collector to recover back taxes illegally exacted;" and the court did not require any protest. The *rule was adopted* by the commissioner, and would not be changed on further application; and business could be transacted only on that footing; and they paid within sixty days. *Here the rates were fixed* by the defendant, and the shipper must pay or forego shipment, and plaintiffs paid within thirty days. In principle the cases are alike.

In *McGregor v. Erie Railway Co.*, 35 N. J. Law, 89-113, plaintiff recovered back from defendant certain moneys unlawfully demanded and taken for transportation of merchandise from Paterson to Jersey City. Bedle, J., said: "In these cases there was no express refusal, but I do not consider it necessary that the refusal should be express. It is sufficient if the person has just and reasonable ground to apprehend that, unless the money is paid, his goods will not be carried, or will be withheld. Where a cor-

poration or person has the power to refuse a right to which a party is entitled, unless he complies with an unjust demand, they do not stand on an equal footing." And the court held: "But when they are not on an equal footing and money is paid, not by compulsion of law, but by compulsion of circumstances—as when it is paid to release goods from illegal restraint, which cannot otherwise be reasonably effected, or to compel the performance of a duty by others in order to enjoy or obtain a right—it may be recovered back. Under this head may be classed moneys paid under color of title or charges on turnpikes and railroads."

"Courts will not be illiberal in allowing a person to act upon his reasonable apprehension of such refusal, where the circumstances fairly show that, unless he does so submit to the demand, his right will be withheld."

In *Lafayette & Indianapolis R. R. Co. v. Pattison*, 41 Ind. 312, the excessive charges were recovered back. The syllabus contains the following: "During the rebellion A. had a contract to furnish the government with a certain number of beef cattle during two months, and for the purpose of filling such contract, went to Chicago, and made a contract with a railroad company to ship cattle for him to Indianapolis at sixty-five dollars per car; and, leaving an agent to ship, he returned to Indianapolis to receive the cattle. The cattle of the first shipment of two car loads were sent to the cattle yard of A., and after a few days a bill for \$201.2 was sent to A., which he refused to pay, and informed the agent of the railroad company that he had a contract for the shipment at sixty-five dollars per car; the agent denied knowledge of any such contract, and insisted that the bills must be paid as presented, and that he would not deliver any future car loads of cattle until the freight was paid, as he made it up from the way bills, and that the bills included other things besides freight, which he could not itemize. It was agreed that A. should pay under protest, and also future freight, and the cattle should be delivered as they arrived, and A. should reserve the right to recover any sum so paid unjustly. In pursuance of this agreement, the agent delivered the cattle at the yard of A. as they arrived from time to time, and as soon as the bills were prepared, they were paid by A."

"*Held*, that the payments were not voluntary, and that A. could recover all sums so paid in excess of his contract price." And Bushkirk, J., says: "We are of opinion that the money so paid could be recovered back if there had been no valid agreement that it might be. While the appellants were not in the actual possession of the cattle of the appellee, they possessed such power and control over the shipment and delivery thereof as gave them an undue advantage over the appellee, and the necessity of the appellee was so great and pressing as to deprive him of the freedom of his will."

"The case of Chicago & Alton R. R. Co. v. C., V. & W. Coal Co., 79 Ill. 121, is as follows:

"Certain individuals constructed a railroad twelve miles long, extending from a coal mine, belonging to a coal company, to a station on the Illinois Central Railroad, and, on the 30th of April, 1869, they sold the same to a railroad company, and turned it over to them, and, on the same day, the company purchasing it turned it over to another railroad company. The last-named company operated the road in pursuance of the contract of sale between the first owners and the purchasers from them, for three years, complying with the terms of said contract as to the rates of freight to be charged to the coal company for the transportation of its coal. The individuals building and selling the road and the coal company were the same. *Held*, that the railroad company last purchasing, by taking the road and reorganizing the rates of freight established by the contract of sale, adopted the contract, and were bound by its terms, and that the coal company could maintain an action against them for a breach of it."

"In such a case, where the coal company had no other outlet for its coal, and the railroad company exacted more freight than, by the terms of the contract, they were entitled to, the coal company should be considered as under a kind of moral duress, and the payment by them of the freight demanded, under such circumstances, could not be considered voluntary, and they would have the right to sue upon the contract, and recover back the excess of freight paid over the contract rate."

Mr. Justice Breese said: "It can hardly be said these enhanced charges were voluntarily paid by appellees. It was a case of 'life or death' with them, as they had no other means of conveying their coals to the markets offered by the Illinois Central, and were bound to accede to any terms appellants might impose. They were under a sort of moral duress, by submitting to which appellants have received money from them which, in equity and good conscience, they ought not to retain."

In *Mobile & Montgomery Ry. Co. v. Stiner*, 61 Alabama, 559, illegal charges for transporting cotton were recovered back. The court held: "The nature of the business considered, the shipper does not stand on equal terms with the carrier in contracting for charges for transportation; and if the shipper pays the rates established in violation of law by the carrier, rather than forego his services, such payment is not voluntary in the legal sense, and the shipper may maintain his action for money had and received, to recover back the illegal charge."

To the objection that the payments were voluntarily made, and therefore could not be recovered back, Stone, J., said: "Railroads have so expedited and cheapened travel and transportation, have so driven from their domain all competing modes of transporta-

tion, that the public is left no discretion but to employ them, or suffer irreparable injury in this age of steam and electricity. They have their established rates of charges, and these the shipper must pay, or forego their facilities and benefits. To object or protest would be an idle waste of words. The law looks to the substance of things, and does not require useless forms or ceremonies. The corporation and the shipper are in no sense on equal terms, and money thus paid to obtain a necessary service is not voluntarily paid, as the law interprets that phrase."

The above citations are sufficient.

The foregoing principles and authorities show that the payments made in this case should *not* be regarded as *voluntary*, and that no principle of equity shown by defendant can aid the defendant in withholding from plaintiffs the money so unjustly obtained by the defendant.

There was error in the courts below, and this court enters judgment for the plaintiffs for the amount found by the court below, together with interest on the same from the first day of that term of court, and costs of suit.

JOHNSON, C. J., concurs in holding that under the facts disclosed the excessive charges may be recovered back, but he dissents from the construction placed on Sec. 12 of the act of 1848, which limits the rate of freight to five cents per ton per mile for distance of thirty miles or more, and reasonable rates for less distances. He does not think that section applies to packages and parcels weighing less than a ton, and which by the usual custom are not shipped by weight.

MOLLVAINE, J., dissenting: I differ from my brethren on the weight of testimony in this case. I think the payments of illegal rates were voluntary. The payments were not made at the time goods were carried, but at the end of the month for past freights, and I have been unable to find any testimony satisfactorily showing that payments were exacted as a condition of future freightage, or paid on any reasonable belief that future freights would be refused unless payments were made.

Judgment reversed, and judgment for plaintiffs.

Statutes Prohibiting Excessive Freight Charges.—As to the construction of such statutes generally, see *Lotspeich et al. v. Central R. R. & Banking Co. of Georgia*, and note, *supra*.

What are Reasonable and what Unreasonable Charges—As to what is a reasonable and what is an unreasonable rate of freight, see the following authorities: *Myers v. London & S. W. R. Co.*, L. R. 5 C. P. 1; *Canada S. R. Co. v. International Bridge Co.*, L. R. 8 App. Cas. 723; *Campbell v. Marietta & Cinn. R. R. Co.*, 23 Ohio St. 168; *Lotspeich et al. v. Central R. & B. Co. of Ga.*, 78 Ala. 306. s. c. *supra*.

Recovery of Excess in Freight Charges.—In general, where a shipper has

been compelled to pay more than a legal rate of freight in order to have his goods transported, the payment is not considered as voluntary, but under compulsion, and the excess is recoverable in an action instituted for that purpose. *McGregor v. Erie Ry. Co.*, 35 N. J. L. 89; *Mobile & Montgomery R. Co. v. Steiner et al.*, 61 Ala. 559; *Chicago & Alton R. Co. v. C. V. & W. Coal Co.*, 79 Ill. 131; *Parker v. Great Western R. Co.*, 7 Mann. & Gr. 253; *Lafayette & Ind. R. Co. et al. v. Pattison*, 41 Ind. 812; *Fuller v. Chicago & N. W. R. Co.*, 31 Iowa 187; *Herrman v. B. C. R. & N. R. Co.*, 57 Iowa 187; s. c. 9 Am. & Eng. R. R. Cas. 339.

And see *Railroad Co. v. Lockwood*, 17 Wall. 357-379.

But see *contra*, *Potomac Coal Co. v. C. & P. R. Co.*, 38 Md. 226; *Kenneth et al. v. South Carolina R. Co.*, 15 Rich. L. (S. C.) 284; *Dubose v. Georgia R. & Banking Co.*, 50 Ga. 304; *Steever v. Illinois Central R. Co.*, 16 Am. & Eng. R. R. Cas. 53.

When, in view of unexpected difficulties in transportation, the consignor pays a sum greater than originally agreed upon, he cannot recover the excess. *Detroit, etc., R. Co. v. McKenzie*, 9 Am. & Eng. R. R. Cas. 15.

Miscellaneous Points of Practice.—A bill against several defendants for a discovery and account of alleged overcharges in freight, the liability being purely legal, cannot be sustained on the ground merely that the condition of affairs is such that at law plaintiff would be obliged to sue each of defendants separately for a fractional part of the overcharge. *Scott v. Erie R. Co.*, 34 N. J. Eq. 354; s. c. 16 Am. & Eng. R. R. Cas. 53.

The mere fact that the statute prohibiting the excessive charge has been repealed after the taking thereof, constitutes no bar to an action to recover back the excess. *Graham v. Chicago, M. & St. P. R. Co.*, 53 Wisc. 473; s. c. 8 Am. & Eng. R. R. Cas. 289.

A station agent who ships his own goods at a higher rate than allowed by law cannot recover the excess paid by him. *Steever v. Illinois Central R. Co.*, 16 Am. & Eng. R. R. Cas. 53.

Limitations.—In Iowa an action to recover penalties for excessive freight charges must be brought within two years. *Harriman v. Burlington, etc., R. Co.*, 9 Am. & Eng. R. R. Cas. 339. But an action to recover the excess of freight paid may be brought at any time within five years. *Heiserman v. Burlington, C. R. & N. R. Co.*, 16 Am. & Eng. R. R. Cas. 46.

HOUSTON & TEXAS CENTRAL R. CO.

v.

HARRY & BRO.

(Advance Case, Texas, Feb. 13, 1885.)

The statute of May 6, 1882, General Laws of Texas, p. 35, giving damages to a consignee for failure to deliver freight in accordance with the provisions of that act, is in violation of no provision of the constitution, but was passed in obedience to Sec. 10, Art. 2. of that law, and is a valid, binding law.

It is for the legislature to determine, on the part of a railroad, what constitutes abuse, and to determine what laws will correct them, and what remedies may be necessary to enforce such laws.

Sec. 24, Art. 16 of the constitution refers to only such fines and forfeitures as under the law may accrue to the public, and has no application to such sums as under the statute may enure to the benefit of a citizen for wrong done to himself, the extent of recovery alone being regulated by statute.

Without reference to the statute, a party whose goods are detained without necessity therefor, after the payment, or tender of payment, of the carriage price as evidenced by the bill of lading, has cause of action against the railroad. The statute simply provides the measure of damage.

APPEAL from Washington county.

George Goldthwaite, for appellant.

Sayles & Bassett, for appellees.

STAYTON, J.—This action was brought to recover the damages allowed by the act of May 6, 1882 (General Laws, p. 35), for failure to deliver freight in accordance with the provisions of that act. The third section of that act is as follows: "Sec. 3. That any railroad company, its officers, agents or employes, that shall refuse to deliver to the owner, agent or consignee, any freight, goods, wares and merchandise of any kind or character whatever, upon the payment, or tender of payment, of the freight charges due as shown by the bill of lading, the said railroad company shall be liable in damages to the owner of such freights, goods, wares or merchandise, to an amount equal to the amount of the freight charges for every day said freight, goods, wares and merchandise is held after payment, or tender of payment, of the charges due, as shown by the bill of lading, to be recovered in any court of competent jurisdiction."

The petition alleges all the facts made requisite by the act to sustain the action, and as there is no statement of facts, it must be presumed that the facts alleged were proved. Special demurrers to the petition were urged, and by the court overruled, and judgment rendered for the plaintiff. The overruling of the demurrers is assigned as error.

The demurrers were: "1. Because in truth and in fact it appears upon its face to be a statute to prevent and punish a criminal offence by the forms of civil procedure, and so deprives the defendant of the guarantees thrown around it in common with all other citizens by the constitution of the State.

"2. Because it takes the property of one citizen and gives it to another without due process of the law of the land.

"3. Because the plaintiff's claim is for a fine, forfeiture or penalty, and fines, forfeitures or penalties are specially appropriated to special use, to wit, for laying out and working public roads, and cannot be appropriated to individual use.

"4. Because it does not appear in and by their petition that they are, or were in any manner, injured or damaged by the detention of their goods."

A very elaborate argument has been filed in support of the demurrers, but no provision of the constitution has been cited which to us seems to deprive the legislature of power to enact the law in question. The act in question was most probably passed

in obedience to Sec. 2, Art. 10, of the constitution, which declares that "the legislature shall pass laws to correct abuses, and to prevent unjust discrimination and extortion in the rates of freight and passenger tariffs on the different railroads in this State, and shall from time to time pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight on said railroad, and enforce all such laws by adequate penalties."

It rests with the legislature to determine what on the part of a railway constitute abuses, and to determine what laws will correct them, as well as what remedies may be necessary to secure the enforcement of such laws. Over these matters the legislature has full power in the absence of some constitutional restraint. Whether abuses shall be corrected through statutes which declare the act or acts which constitute one abuse a crime, punishable in some of the modes in which crime is ordinarily punished, or whether the given abuse shall be corrected through a civil action given to the person whose private right has been violated, in which not only actual compensation for the wrong done may be recovered, but in which damages in excess of this, in the way of punitive or exemplary damages, may be recovered, was left to the discretion of the legislature.

Without statutes, in case of willful wrong, gross negligence, fraud and oppression, such damages are given in the ordinary administration of justice through the courts, and it is difficult to perceive wherein a thing which may lawfully be done without a statute, becomes unlawful if done with the direct sanction of the legislature. The statute in question gives the action to the person injured by the wrongful act, and its fruits may be simply compensation for the injury done, or may be more; if more, the excess is but exemplary damage, the amount of which may and will depend on the length of time the defendant refuses to comply with a contract voluntarily made by it, and continues to hold, without right, in defiance of law and disregard of the rights of the owner, property which it, in the exercise of a public employment, has contracted promptly to deliver. That exemplary damage may be recovered in certain cases, even when the act on which the action is based may be punished as a crime of high degree, is manifested by the constitution itself. (Constitution, Art. 16, Sec. 26.)

Statutes of like character as that under consideration have been held not penal, but remedial. *Frohock v. Pattee*, 38 Maine, 107; *Quinly v. Carter*, 20 Maine, 221; *Reed v. Inhabitants of Northfield*, 13 Pick. 94.

Without reference to the statute the owner of goods detained, without necessity therefor, after the payment or tender of the price of carriage, as evidenced by the bill of lading, has cause of action, and the statute simply provides what the measure of dam-

ages shall be. Nominal damages would be given without proof of any actual damage sustained. Parties contract with reference to the law, and may discharge themselves from liability by complying with their contracts, and if they fail to do this, it may be held that they have agreed, in case of such failure, to pay the sum to be ascertained as provided by the statute as fully as though the provisions of the statute had been made, in express terms, a part of the contract. If, however, the statute could not be deemed strictly remedial, it would not alter the rule, for the reasons before stated; and, besides, actions similar in character, when not prosecuted by and for the benefit of persons directly injured by the wrong done, have been given by statutes in this State, in other States and by Congress, for so long a period without question, that it may well be presumed that the constitution was adopted in the light of the past exercise of such power by the legislatures to enact laws whereby a fixed sum may be recovered by an action *quasi* penal, even for the correction of some abuse which might be corrected by a statute making the act which constitutes the abuse a crime.

This must be held to be true when there is nothing found in the constitution which in express terms, or by fair implication, prohibits the exercise of such power by the legislature. He that claims an act of the legislature to be in conflict with the constitution must be able to put his finger on the provision of the constitution infringed, and it must clearly appear that such is the character of the act, or it cannot be so held. It is not enough that the act may seem to be impolitic, or that it may be in conflict with what may seem to be, abstractly considered, a correct theory of right; if it be not in conflict with the spirit and the letter of the constitution, the former to be ascertained from the language in which the constitution is written, it is the duty of a court to hold the act valid.

Sec. 24, Art. 16, of the constitution evidently refers only to such fines and forfeitures as under the law may accrue to the public, such as fines imposed for punishment for crime, and such forfeitures as occur through bail bonds and like obligations, and has no application to such sums as, under statutes, may enure to a citizen for a wrong done to himself, the extent of recovery alone being prescribed by law.

There is no error in the judgment, and it is affirmed.

Affirmed.

PEORIA & PEKIN UNION RAILWAY CO.

v.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY CO.

(109 *Illinois Reports*, 135.)

A railway company engaged in the transportation of freights for hire as a common carrier is bound to transport or haul upon its road the cars of any other railroad company when requested so to do, and will hold the same relation as a common carrier to such cars that it does to ordinary freight received by it for transportation, and in case of loss will be held to the same measure and character of liability to the owner of the cars so received for transportation as would attach in respect to any other property.

In this case the defendant railroad company's principal business was switching cars for other railroad companies. Its tracks were connected with those of the other railroads by a transfer switch, and with mills, elevators and manufactories in and around the city where its business was transacted. The plaintiff corporation brought a car, loaded with freight, to the city, and placed the same on the transfer track, with orders to the defendant to ship the same to a certain distillery, to which place it was taken and unloaded. When unloaded it was taken by the defendant, without orders from the plaintiff, to a sugar refinery, to be loaded, and then switched to the transfer track for shipment. On the same day the sugar refinery was burned, and also the car. *Held*, that the defendant was liable, as a common carrier, to the plaintiff for the value of the car so destroyed.

APPEAL from the Appellate Court for the Second District; heard in that court on appeal from the Circuit Court of Peoria county.

This action was brought by the Chicago, Rock Island & Pacific Railway Company, against the Peoria & Pekin Union Railway Company, to recover the value of a freight car destroyed by fire. In the first count of the declaration defendant is charged with having borrowed the car, and with a failure to return on request; and by the second and third counts defendant is charged as a common carrier, the delivery of the car, the obligation to return, and the failure to do so, being alleged with the usual formality. Only the general issue was filed to the declaration, but by stipulation it was agreed either party might introduce any evidence under the general issue that could be introduced under any special plea or replication thereto well pleaded. On the trial in the circuit court, plaintiff recovered a judgment for \$410.14, which was afterwards affirmed in the Appellate Court for the Second District. A majority of the judges of the latter court having certified that in their opinion the case involves questions of law of "such importance on account of principal interest, as well as collateral interests, that it should be passed upon by the Supreme Court," defendant brings

the case to this court on appeal, as it was permitted to do under the order of the Appellate Court. It is also certified by the judges of the Appellate Court that certain propositions, numbered from one to seven inclusive, embodied the "main and particular questions of law involved." So far as these propositions are or may be necessary to an understanding of the case, they will be found stated in the opinion of the court.

Stevens, Lee & Horton, for the appellant.

The car was stored on the track of the Chicago, Rock Island & Pacific Railroad Company, as ordered, and while on the track the obligation of the Peoria & Pekin Union Company, if any existed, in the preservation of the car, bore the same relation only as the law imposes on a warehouseman. *Porter v. Chicago & Rock Island R. R. Co.*, 20 Ill. 407; *Richards v. M. S. & N. I. R. R. Co.*, *Id.* 404; *Chicago & Alton R. R. Co. v. Scott*, 42 *Id.* 132; *Merchants' Dispatch Co. v. Hallock*, 64 *Id.* 284; *Rothschild v. Michigan Central R. R. Co.*, 69 *Id.* 164.

The defendant did not stand in the relation of a common carrier as to the plaintiff. The plaintiff did not pay for the switching, but this was done by the consignees.

J. C. Hutchins, Thomas F. Withrow and H. W. Wells, for the appellee.

A railroad company may become a common carrier of cars. Rolling stock is made personalty, and is the subject of carriage. *Mallory v. Tioga R. R. Co.*, 39 Barb. 488; *Railroad Co. v. Flanagan*, 77 Ill. 365; *Railroad Co. v. Smithson*, 1 Am. & Eng. Ry. Cases, 101.

Such companies are liable, as carriers, for the loss of empty sacks while being returned. *Pierce v. Milwaukee R. R. Co.*, 23 Wis. 387; *Aldridge v. Railroad Co.*, 15 Com. B. (N. S.) 582; "The Hardy," 1 Dill. 460; *Adams Express Co. v. Lesure*, 39 Ill. 312.

A carrier cannot become a warehouseman while the property is in transit. *McDonald v. Western R. R. Co.*, 34 N. Y. 497; *Ouinit v. Henshaw*, 35 Vt. 605.

A railway company cannot make warehouses out of its cars upon its tracks. *Jenks case*, 103 Ill. 588; *Porter v. Railroad Co.*, 20 *Id.* 407.

SOOT, J.—The defendant in this case is a railroad corporation existing under the laws of this State. By the constitution of the State (Sec. 12, Art. 11), all railways are "declared public highways, and shall be free to all persons for the transportation of their persons and property thereon, under such regulations as may be prescribed by law." It is conceded defendant is a common carrier of freights for hire, and as such is bound to carry safely all

freights tendered, with the usual and customary fares, or answer in damages for its miscarriage or refusal. Sec. 10, Art. 11, of the constitution provides, "the rolling stock and all other movable property belonging to any railroad company or corporation in this State shall be considered personal property." It must also be conceded a common carrier of freights would be compelled to receive and carry this class of property for the usual fares, as well as other personal property. When the facts of this case shall be stated, it will be seen these constitutional provisions have an important bearing on the decision to be rendered.

It appears from the evidence, defendant's principal business is switching cars for other railroad companies having their terminal points at Peoria, together with some work of that class on its own account. Its tracks are situated in the lower part of the city, and thence connecting by lines of track with mills, elevators and manufactories in and about the city. Other companies desiring to have cars switched by defendant would place such cars on its transfer switch, and defendant would transfer them to the consignees whose places of business were on its tracks, as they should be ordered to do by the company placing them there. When such cars were unloaded by the consignees, it was the duty of defendant to return them to the company from which it received them. Most generally such cars were returned empty. There is evidence, however, that tends to show it was the common understanding among the companies doing business at this point, if other shippers desired cars, defendant, without any specific order to that effect, was at liberty to place them at their places of business to be loaded, and when loaded they would be returned to the company owning such cars, to be shipped. At all events, it appears cars were so handled, and the companies concerned seem to have acquiesced in that mode of doing business. On the 25th day of October, 1881, a car belonging to plaintiff was brought to the city of Peoria loaded by the Peoria & Rock Island Railroad, a railroad operated by plaintiff, and was placed on the transfer track, and the agent who acted for the Rock Island roads ordered it to be switched to the Monarch mills, or distillery. On the 27th day of that month it was taken by defendant to the distillery, where it was unloaded by the consignees, and on the same day it was taken by defendant from the distillery to the Peoria sugar refinery, on an order from the refinery, to be loaded, and then switched to the transfer track for shipment by the Chicago, Rock Island & Pacific Railway Company. In the afternoon of the same day the refinery was burned, and also this car, which was standing in close proximity. There was no order from plaintiff to take this car to the sugar refinery for any purpose, and it is not shown it had any knowledge defendant intended to do so.

The propositions of law certified by the appellate court, when resolved, involve the single inquiry whether defendant, in the transaction out of which this action arose, bore to plaintiff the relation of a common carrier, or was it that of a bailee, or that of a warehouseman. When the true relation of the parties shall be ascertained, the law fixes the extent of defendant's liability, if any exists. Unless it shall be found defendant was a common carrier as to this car, no liability would rest upon it for the loss, as no negligence is imputed to defendant.

The question presented is one of first impression in this court. Nor have counsel cited any case where the exact question involved has been considered by any court of last resort. It leaves this court free to determine the law on principle, as shall be thought to best subserve public interests as well as the private interests of corporations concerned. No proof is needed to show the extent and the importance of the interests involved in the decision. It is a matter of so much public concern, that judicial notice may be taken of the fact that cars belonging to different companies are interchangeably used on all the principal railroads in the United States, and that no company could do any considerable freighting business that did not conform to this general usage. Without such usage, it would be difficult, if, indeed, it would be possible, to transact the commercial business of the country. Freights for shipment across the continent could not well be stopped at the terminus of each carrier's line, and re-shipped in cars of the connecting carrier. That would occasion more delay than the necessities of commerce would tolerate. The extent of the usage in regard to the exchange and transportation of cars among so many different railroads would seem to require such exacting rules and regulations as would insure the strictest accountability on the part of companies that may transfer or haul cars over their respective roads.

The statute of this State that forbids "extortion and unjust discrimination" by railroad companies, would seem by its provisions to recognize that railroad corporations may be common carriers of "cars," as well as of freights, for such a corporation is not only forbidden to make any unjust discrimination in its charges for the transportation of passengers or freights of any description, but for the use and "transportation of any railroad car" upon its road. And why may there not be such a thing as a common carrier of cars, either with or without its load of freight? As to the freight the car contains, it will be conceded such carrying roads are common carriers, and are subject to the strict liability of such carriers, and, as has been seen, by a constitutional provision all the rolling stock and other movable property belonging to a railroad corporation in this State shall be considered personal property. What reason exists for discriminating against this class of "personal

property," and for holding that railway companies carrying it shall not be regarded as common carriers? The mode of moving it, whether on wheels or in carriages, ought not to be the foundation for any distinction. In either case the property is in the exclusive care and control of the carrier, and there is as much reason arising from public considerations why such a carrier should be held to the strict liability of an insurer for the safety of the property, in the one case as in the other. The facts in the present case show a strong necessity for imposing the liability attaching to a common carrier. The car in question was delivered to defendant, to be carried over its road to the warehouse of the consignees of the freight it contained. A charge for the service to be rendered was made, and was paid by the consignees. The undertaking was also to return the car to the company from which it had been received, and the charges collected, or to be paid, included the latter service. Thus it is seen defendant had the exclusive control of the car while on its track while in course of transportation to the consignees, and that control would seem to be as absolute as over any package of freight it might have to carry or otherwise deliver. Plaintiff had parted with care and custody of the car, and could not, at any point on defendant's road, interfere for its safety. Its care was intrusted to defendant as fully as was the freight it contained. The undertaking of defendant in regard to moving the car was within the scope of the general business it had engaged to do for the public, and it would seem no reason exists why the liability for the safe delivery of the car should not be the same as to the freight it contains, which, it is conceded, is that of a common carrier. On what principle may defendant be considered a common carrier as to freights on its road, and not as to the car containing it, which it is moving over its road with its own propelling power?

The law, as has been seen, makes all railways in this State "public highways," open to the use of all persons for the transportation of their persons or property, under such regulations as may be prescribed by law, and it is apprehended it is unlawful to make any discrimination as to the property offered to be carried, or as to whether it belongs to a private person or to a corporation. If it is such property as is capable of being carried with the means ordinarily employed by such carriers, the obligation is imperative, and the carrier must receive the property and carry it with safety, in the way such property is usually carried, and any failure to do so will subject the carrier to damages.

The only case to which the attention of the court has been directed having any features like the one being considered, is *Mallory v. Tioga R. R. Co.*, 39 Barb. 488. In that case the defendant company, which, it is conceded, was a common carrier as to freights and passengers, engaged to furnish plaintiff the

motive power to draw his cars, loaded with his property, over its road, the plaintiff being obligated to load and unload his cars, and furnish brakemen to accompany them, but who were subject to the control of defendant's conductor, and it was held defendant assumed the liability of a common carrier, and consequently was liable for injuries to plaintiff's cars and property not caused by inevitable accident or the public enemies.

But aside from authority, the conclusion reached on principle is, defendant occupied the relation of a common carrier as to the car of plaintiff in its possession, as well as the freight it contained, and as such was liable for its safe return to plaintiff, unless its loss occurred from causes which exempt common carriers, which is not claimed in this case.

The judgment of the appellate court will be affirmed.

Judgment affirmed.

Transportation of Cars of Other Companies.—The question referred to in the principal case as to whether or not a railroad company is bound, on demand, to receive and transport over its line the cars of other companies, is one of importance and much doubt. In a recent case, not yet reported, in the Circuit Court of the United States for the Eastern District of Pennsylvania, the Baltimore & Ohio R. R. Co. sought by injunction to restrain the Pennsylvania R. R. Co. from refusing to receive its cars for transportation at reasonable rates, alleging that the company defendant was bound so to receive and transport them. The court declined to grant a preliminary injunction, holding that the question involved was so important that it should not be passed upon until final hearing.

In this connection, it is well to observe that when railroads were first established in this country, they undertook to furnish the rails and motive power only. The rolling-stock was furnished by their customers. See *Peters v. Ryland*, 20 Pa. St. 497. This fact should, it seems to us, have considerable weight.

Railroad companies are, in many States, required by statute to receive and transport the cars of other companies when so requested. *Michigan Central R. R. Co. v. Smithson*, 1 Am. & Eng. R. R. Cas. 101; *Rae v. Grand Trunk R. R. Co.*, 9 Am. & Eng. R. R. Cas. 470; *Texas & Pac. R. Co. v. Carlton*, 15 Am. & Eng. R. R. Cas. 850.

While so transporting them, and in complete and undisputed control of them, they are liable as common carriers in case any injury to them is occasioned. *New Jersey, R & T. Co. v. Pennsylvania R. Co.*, 8 Dutch (N. J.), 100; *Mallory v. Tioga R. R. Co.*, 89 Barb. 488; *Vermont & Mass. R. R. Co. v. Fitchburg R. R. Co.*, 14 Allen, 462.

See also, as having some bearing on the question, *Hannibal Railroad v. Swift*, 12 Wall. 262; *Atchison, T. & S. F. R. Co. v. Denver & New Orleans R. Co.*, 16 Am. & Eng. R. R. Cas. 57.

MONTGOMERY & EUFAULA RAILWAY CO.

v.

KOLB *et al.*(78 *Alabama Reports*, 396.)

The rules observed by shippers in their general transactions with the depot agent of a railroad company touching the delivery of freight for shipment, if continuous or general, though not universal, may grow into a usage, authorizing others to treat it as the proper rule, and as an element of the contract of shipment, although the usage may be in conflict with regulations established and promulgated by the company's superintendent, known to the shippers, and no notice of it is traced to the superintendent.

It is the duty of a railroad corporation to keep itself informed as to the manner in which its depot agents conduct their agency, and as to their habit or usage in the matter of receiving and delivering freight; and it cannot escape responsibility for the consequences of a usage which its own trusted agents had permitted to grow up, and to be acted upon, on the ground that such usage is contrary to its established regulations, and was not known to its superintendent or managing agent.

Proof of a constant and habitual practice and usage of a common carrier to receive goods for transportation when they are deposited for him in a particular place, without special notice of such deposit, is sufficient to show a public offer by the carrier to receive in that mode, and to constitute an agreement between the parties, by which the goods, when so deposited, shall be considered as delivered to him, without any further notice.

A deposit of cotton in a street along the side of a platform of a railroad depot, or in the railroad cotton-yard, for shipment, in pursuance of a custom or usage adopted or sanctioned by the depot agent, may amount to a delivery to the railroad company, although no receipt is given by the agent to the shipper, and such usage or custom is contrary to the established regulations of the company, known to the shipper, and no notice thereof is traced to the superintendent or managing agent of the company.

When the bill of exceptions does not purport to set out all the evidence, this court will, on appeal, presume that there was testimony to justify all the rulings of the primary court, if, under any state of proof, they would be free from error.

Charges should always be framed in reference to the testimony; and if a charge asked raises an inquiry on a matter of fact, of which there is no testimony, it should be refused.

While the statute makes it the duty of common carriers to give receipts for merchandise delivered to them for transportation, their failure to do so cannot vary their liability, if delivery is satisfactorily shown.

In an action against a railroad company for the loss of nine bales of cotton, alleged to have been delivered to defendant, with other cotton, for shipment, for which no receipt was given, a charge instructing the jury that it was not necessary to identify the cotton by marks or brands, or by a certain number of pounds, but that they must be satisfied "in regard to the nine particular bales of cotton," either by an average, or by some other means, so that they could say that the nine bales of cotton sued for were owned by the plaintiffs, is free from error, there being evidence tending to show the average weight, class and value of the cotton.

APPEAL from Barbour City Court.

This was a suit by Kolb & Hardaway against the Montgomery & Eufaula Railway Company, a body corporate, to recover the value of nine bales of cotton alleged to have been delivered to the defendant at Eufaula for transportation to Montgomery, and which were never delivered by the defendant at the latter place; was commenced on 12th March, 1881, and was tried on the plea of the general issue, the trial resulting in a verdict and judgment for the plaintiff, from which the defendant appealed.

As recited in the bill of exceptions, "the proof showed that the defendant was a common carrier of goods; that plaintiffs were cotton buyers and shippers in Eufaula, Alabama, dealing largely with defendant as such common carrier, and during the fall and winter of 1880-1, shipped a large number of bales of cotton over defendant's road; that at the beginning of that season, in August, 1880, the superintendent of the defendant company issued instructions to defendant's station agent at Eufaula as to the manner of receiving cotton for shipment, and gave notice to cotton shippers in Eufaula of such instructions, such instructions and notice being contained in a printed circular, a copy of which was given to plaintiffs." This circular was read in evidence by the defendant, and its contents, so far as pertinent to the facts of the case, may be summarized as follows: (1) No cotton will be received upon the yard of the company unless ready for shipment. Each dray load of cotton must be accompanied by a dray receipt in duplicate, giving the names of the consignor and consignee, the marks, number of bales and place of destination. (2) When cotton is shipped in lots, an application, giving marks, name of consignee and other needed shipping directions, should precede or accompany the first dray load of the lot, in which case the dray receipt will only be required to give the name of the consignee, marks and number of bales. Agents will sign and return to shipper a receipt for each dray load, retaining the duplicate. When the lot is completed, the shipper must produce the dray receipts for the entire lot, upon which alone will the regular cotton receipt be issued. (3) Should any cotton be placed upon the yard of the company without proper receipt being taken by the shipper, it will be at his risk entirely, as the company will assume no risk whatever upon goods not placed properly in its possession. (4) When cotton is hauled to the depot, it is understood to be ready for shipment, and hence, it will be loaded in the cars as it arrives, when necessary. (5) The depot will be open for the receipt of cotton during such hours of the day as will meet fully the business requirements of the station; and at terminal points, during periods of heavy shipments, a cotton clerk will be constantly in cotton-yard during such hours to sign dray receipts, direct draymen where to discharge, and to avoid their unnecessary detention. (6) No receipt will be issued until the cotton is on the platform, and the company

furnished with shipping directions; and the company will not be responsible for the cotton until the receipt is given; and agents will not permit shippers to hold cotton on the yard indefinitely for the purpose of making up lots, or for any other purpose, when such accommodation is detrimental to the shippers, or interferes with the facilities for attending to the business of the station.

"The evidence tended to show that a very small portion of the cotton of the plaintiffs was received from the plaintiffs by the defendant in compliance with these instructions during that season." As further recited in the bill of exceptions, "the proof as to the loss of the nine bales of cotton sued for was made by showing the number of bales of cotton sent to the depot and cotton-yard of defendant, and showing that the defendant had receipted for nine bales of cotton less than this number." The other facts in evidence, necessary to an understanding of the points decided, so far as set out in the bill of exceptions, are sufficiently stated in the opinion.

The court, *ex mero motu*, charged the jury, among other things, that "it is not necessary that they should identify the cotton by marks or brands, or by a certain number of pounds, but that the evidence must satisfy you in regard to the nine bales of cotton, either by an average or by some other means, so that you can say that nine bales of cotton were owned by the plaintiffs, the nine bales for which they brought suit." The court also gave the following charge at the request of the plaintiffs: "If the jury are reasonably satisfied from the evidence that there was, during the months of November and December, 1880, a constant and habitual practice and usage of the defendant to receive cotton when it was deposited for it on its enclosed ground without special notice of such deposit, that is sufficient to show a public offer by it to receive goods in that mode, and to constitute an agreement between the plaintiffs and defendant, by which the cotton, when so deposited, shall be considered as delivered to it without any further notice."

The court refused to give to the jury the following charges requested by the defendant: (1) "It is usual and regular for carriers to issue receipts for goods received by them for transportation; and if in this case the plaintiffs fail to produce such receipts, it is incumbent on them to account for their loss, or, failing therein, such failure must be taken as *prima facie* evidence that the goods they claim to have delivered to defendant were never delivered." (2) "If the jury believe from the evidence that the defendant has established rules and regulations for the receipt of goods by it for transportation as a common carrier at its depot in Eufaula, and such rules were reasonable, and that plaintiffs knew what such rules were, then they could not make a delivery to defendant of goods for transportation as a common carrier, except in accordance therewith; and unless the rules provided for a constructive

delivery, then no constructive delivery could have been made by the plaintiffs." (3) "If the jury believe from the evidence that defendant had established reasonable rules and regulations for the receipt of goods by it at its depot in Eufaula, for transportation as a common carrier, and they were known to plaintiffs, the defendant cannot be held liable to plaintiffs as a common carrier for goods attempted to be delivered to it in violation of such rules, which were lost before the defendant assumed actual and exclusive dominion over them." (4) "If the jury believe from the evidence that the defendant had established reasonable rules and regulations for the receipt of goods by it at its depot in Eufaula for transportation as a common carrier, and they were known to the plaintiffs, the plaintiffs cannot hold the defendant liable as a common carrier for goods attempted to be delivered to it on an agreement made with the station agent of defendant in Eufaula, in violation of such rules, unless the plaintiffs show that the goods were lost by the defendant after it had assumed actual and exclusive dominion over them." (5) "The station agent of defendant in Eufaula had no power, in violation of the reasonable established rules and regulations of the defendant for the receipt of goods by it for transportation as a common carrier, without express authority from defendant, to enlarge the liability of defendant, in respect to such receipt of goods, beyond that allowed by such rules; and if the plaintiffs knew that such agent was exceeding his authority in agreeing to receive goods from them contrary to such rules, then the defendant is not liable to plaintiffs for a loss of goods occurring as a consequence of such violation."

The defendant reserved exceptions to the charges given, and to the refusal of the court to charge as requested by it; and these rulings are here assigned as error.

John D. Roquemore, for appellant.

G. L. Comer, contra.

STONE, J.—When the law has declared certain express rules for the government of men, or when persons enter into express stipulations, expressing the terms on which they enter into contracts, it is a reasonable rule, subject only to a few exceptions, that neither custom nor usage will be allowed to dispense with such legal requirements, nor such express stipulations. *Barlow v. Lambert*, 28 Ala. 704. "Where by local custom or usage provincialisms and technicalities of science and commerce, and perhaps some others, have acquired a known, fixed and definite meaning, different from their ordinary import, or where such technicalities, unexplained, are susceptible of two or more plain and reasonable constructions, it is certainly competent to prove the existence of such custom, as a means of showing the sense in which the contracting parties intended to be understood." *Id.* See also the many authorities referred to on the briefs of counsel. Speaking of usage of

trade, Mr. Greenleaf, Ev., Vol. 2, Sec. 251, says: "It is sufficient if it be established, known, certain, uniform, reasonable, and not contrary to law. * * Their true office is to interpret the otherwise indeterminate intentions of parties, and to ascertain the nature and extent of their contracts, arising not from express stipulation, but from mere implications and presumptions, and acts of a doubtful and equivocal character; and to fix and explain the meaning of words and expressions of doubtful or various senses. On this principle, the usage or habit of trade or conduct of an individual, which is known to the person who deals with him, may be given in evidence to prove what was the contract between them." This latter principle may be illustrated by a familiar incident in everyday life. A customer is in the habit of dealing with his merchant, and having his purchases sent home, and his bills run from one to two months, before payment is demanded or expected, and this, too, at cash rates. He selects a given article of merchandise, and orders a given number of yards to be measured off. In this there is not a word said about price, about delivery, or about the time of payment. Yet there is implied in these few simple and indeterminate words and acts, that the goods are sold at their customary cash market value, that they will be delivered at the purchaser's residence without undue delay, and that payment will not be expected until the end of the customary indulgence. So, in *Boon v. Steamboat Belfast*, 40 Ala. 184, quoting from Judge Story, this court said: "The true and appropriate office of a usage or custom is, to interpret the otherwise indeterminate intentions of parties, and to ascertain the nature and extent of their contracts, arising not from express stipulations, but from mere implications and presumptions, and acts of a doubtful or equivocal character."

In September, 1877, Raoul, superintendent of the Southwestern Railroad Co. of Georgia—which company was also operating the appellant railroad company—issued a circular, headed "Notice to cotton shippers and instructions to agents." This notice or circular was again issued at the opening of the season of 1880–1881, and was forwarded to and received by the agent at Eufaula, and a copy was furnished to the appellees, Kolb & Hardaway. Kolb & Hardaway were cotton buyers at Eufaula, did a considerable business, and made many shipments of cotton by the appellant railroad company. This suit was brought to recover the value of nine bales of cotton alleged to have been delivered to the railroad company at Eufaula, to be transported to and delivered at Montgomery, and never delivered. The case turned on the question of delivery to the railroad company at Eufaula; for it is not pretended the railroad company forwarded the cotton or delivered it at Montgomery. In fact, neither the railroad company nor its agent at Eufaula gave any receipt for the cotton alleged to have been lost. There was no express contract fixing the terms.

We have carefully examined the circular, made a part of the

bill of exceptions, and we think its regulations and directions are reasonable. They are alike beneficial to the shipper and carrier. They commend themselves by their wise and systematic provisions, intended to secure prompt shipment, to prevent confusion of goods, and to render disputes about delivery for shipment almost impossible.

It is not pretended that those regulations were conformed to in this case. The claim is, that the railroad company departed from its own regulations, and thus established a usage different from them, which was conformed to in this case. The bill of exceptions recites that "the evidence further tended to show that shortly after the printed 'notice to cotton shippers and instructions to agents' were issued, they were disregarded by both shipper's and defendant's agent at Eufaula, and that it became a general custom and usage to deliver and receive cotton at the depot in Eufaula, in disregard of such printed notice and instructions. The evidence on this subject was very conflicting, the agent himself testifying that he never received cotton for shipment in non-compliance with said instructions, except in a few instances made necessary by what he thought an exigency, and as a matter of accommodation to the shipper." In another place the bill of exceptions states: "The proof further showed that some of the cotton brought to the cotton-yard of defendant by the plaintiffs for delivery to the defendant for shipment was not placed by plaintiffs on a certain plank platform of defendant, upon which defendant required all cotton bales to be placed before it would receive and receipt for them, but was placed in a street running along the side of such platform; but testimony was introduced by said plaintiffs, going to show that the station agent did take cotton bales from this street and receipt for them." In another place, in setting out testimony, it is said, "that plaintiffs frequently and persistently violated these rules and regulations of the defendant company as contained in such 'notice to cotton shippers and instructions to agents,' against the protest of the station agent at Eufaula." It is nowhere shown that the station agent ever did refuse to receive and ship cotton that was delivered for shipment because not delivered in conformity with the printed rules and regulations.

It is contended for appellant that inasmuch as the station agent had positive instructions from the superintendent not to receive or receipt for cotton to be shipped unless delivered in accordance with the printed directions, and inasmuch as the shippers in this case had notice of these regulations, by receiving a copy thereof, then, not having received the agent's receipt for the cotton, they have shown no legal delivery to the railroad, and cannot recover. Such is undoubtedly the law, if the testimony stopped here. Against this it is replied for appellees that the railroad company, through its agent at Eufaula, has permitted a usage to grow up, which dis-

penses with the regulations prescribed in the circular, and constitutes the act done in this case a legal delivery to the railway company. To this it is rejoined that no knowledge of such violation of the regulations is traced to Raoul, the superintendent, and hence the railroad company is not bound by such usage, if proven to have been established.

We think this is too narrow a view of the question. Railroads usually have extended lines, and along those lines are many depots, or stations, at which the business of receiving and delivering freight is carried on. The trading public, as a rule, have no access to the superintendent, and can only know the station agents, with whom they have dealings. They can have no control of the business regulations of the railroad, and have no power of appointment or removal. Whatever regulation, custom or usage such station agent adopts, or permits to be adopted, the public must either conform to or will feel itself justified in conforming to. The rules observed by shippers in their general transactions, if continuous or frequent, although not universal, grow into a usage, which would authorize others to treat it as the proper rule, and as an element of the contract of affreightment. This constitutes the very spirit, the intent of a usage of trade. It supplies, by implication, an unexpressed fact, or link in the chain of facts, which go to make up and prove the contract. And we think it no answer to this, that no testimony was offered of this violation of instructions on the part of the agent, tending to trace notice of it to the superintendent. It was the duty of the corporation to keep itself informed of the manner in which its station agents conducted their agency, their habit or usage in the matter of receiving and delivering freight; and we think it would be highly detrimental to the public service if we were to permit a railroad corporation to escape responsibility for the consequences of a usage, which its own trusted agents had permitted to grow up, and be acted upon. *Piedmont & Arlington Ins. Co. v. Young*, 58 Ala. 476. There was sufficient testimony to justify the court below in submitting to the jury the inquiry whether or not there was a usage at the Eufula depot of the defendant railroad company to dispense with the regulations prescribed in the superintendent's circular. It will be remembered there was testimony tending to show there had been a frequent, if not general, disregard of those regulations, commencing soon after they were issued, a period of more than three years, before the loss complained of in this case. That is certainly a sufficient time to establish a usage of trade. True, the testimony was in conflict as to the frequency and extent of the violation. The question, which phase of the evidence was the true one, was for the jury.

As we have said, the question in this case is, was there or was there not a delivery of the cotton to the railroad? In *Hutchinson*

on Carriers, Sec. 90, is this language: "While it is the undoubted general rule that the delivery, to bind the carrier, must be made either to him or to some one with authority from him, or who may be rightly presumed to have such authority, it is not to be understood that it is not subject to such conventional arrangements between the parties as they may choose to make in regard to the mode of delivery, or that it may not be varied by usage, or by a particular course of dealing between them. * * * If, therefore, the parties agree that the goods may be deposited for transportation at any particular place, and without any express notice to the carrier, such deposit will be a sufficient delivery; and proof of a constant and habitual practice and usage of the carrier to receive the goods when they are deposited for him in a particular place, without special notice of such deposit, is sufficient to show a public offer by the carrier to receive goods in that mode, and to constitute an agreement between the parties, by which the goods, when so deposited, shall be considered as delivered to him, without any further notice. Such a practice and usage are tantamount to an open declaration, a public advertisement by the carrier, that such a delivery should, of itself, be deemed an acceptance by him; and to permit him to set up, against those who had been thereby induced to omit it, the want of the formality of an express notice which had been thus waived, would be sanctioning injustice and fraud." Now, it seems to us this is a clear statement of the principle, and the ground on which it rests. See also *Id.* Sec. 91.

The bill of exceptions does not purport to set out all the evidence, and we must presume there was testimony to justify all the rulings of the court, if, under any state of proof, they would be free from error. *Alexander v. Alexander*, 71 Ala. 295, and authorities cited. Under the statement of testimony found in this record, we are not informed whether its tendency was to prove a usage for the station agent to receive and receipt for cotton delivered in violation of the regulations, before it was placed on the platform for shipment, or whether the usage simply had the extent that when cotton was delivered in disregard of the instructions, he would himself have the cotton placed on the platform, and otherwise prepared for shipment, and then give the railroad's receipt for it. The statement of testimony bearing on this question is as follows: "Testimony was introduced by plaintiffs going to show that the station agent did take cotton bales from the street, and receipt for them;" and the further fact that plaintiffs had no receipt for the nine bales of cotton, the subject of this suit. No question appears to have been raised in the court below on this shading of the question, and we cannot consider it. We must presume, in the absence of averment to the contrary, that the testimony was such as to justify the circuit court in submitting

the question of usage, as applied to this case, to the determination of the jury. The question, then, is, did the court correctly declare the law, upon any possible state of testimony bearing on the question? 1 Brick. Dig. 336, Sec. 12. The testimony, as recited, leaves this question in some obscurity.

Under the rules declared above, the circuit court did not err in refusing to give charges 2, 3, 4, 5, asked by the defendant. Each of them ignored the question of usage, and made the defendant's liability to depend alone on compliance by the plaintiffs with the regulations prescribed in the circular. The charge given by the court at the instance of the plaintiffs is in harmony with our views, and is free from error. Neither did the circuit court err in instructing the jury as to the method of ascertaining the value of the cotton. We must suppose, in favor of the ruling, that there was testimony tending to show the average weight, class and value of the cotton delivered, or claimed to have been delivered, possibly as part of a larger lot.

The first charge requested by the defendant raises a somewhat different question. It asserts that a failure by plaintiffs to produce the railroad's receipt for the cotton made it incumbent on them to account for the loss of the receipt, or (and) failing therein, such failure must be taken as *prima facie* evidence that the goods they claim to have delivered to the defendant never were delivered. It is not claimed in this case that any receipt ever was given for the nine bales alleged to have been lost. It is stated as a fact that none ever was given. There was, therefore, no testimony which raised inquiry as to a loss of the receipt. None had been given. Charges should be framed in reference to the testimony; and if a charge asked raises inquiry on a matter of fact of which there is no testimony, it should always be refused. Its only tendency is to multiply inquiries, and confuse the jury. That charge was rightly refused for this reason. 1 Brickell's Digest 338, Sec. 41; *Ib.* 339, Sec. 61; *Ib.* 340, Secs. 64, 65.

Sec. 2139 of the Code of 1876 makes it the duty of common carriers to give receipts for merchandise delivered to them for transportation. Their failure to do so may render proof of delivery more difficult. It cannot vary their liability, if delivery is satisfactorily shown.

Affirmed.

What Constitutes Sufficient Delivery of Goods to Carrier.—The mere delivery of articles at or near the point from which a railroad company runs its trains does not amount to a delivery to the company which will bind it in the absence of a custom to that effect. *Houston & T. C. R. Co. v. Hodde*, 42 Tex. 467; *O'Bannon v. Southern Express Co.*, 51 Ala. 481; *Brown v. Atlanta & C. Air Line Co.*, 18 Am. & Eng. R. R. Cas. 479.

And see *Pickford v. Grand Junction R. Co.*, 12 M. & W. 766; *Lovette v. Hobbs*, 2 Show. 127; *Leigh v. Smith*, 1 Carr & Payne, 640; *Marquette, etc., R. R. Co. v. Kirkwood*, 9 Am. & Eng. R. R. Cas. 85.

In one case it was decided that even the existence of a custom to the effect that the delivery of goods upon the platform of a railroad company should amount to a delivery to the company, did not render it liable as a common carrier until it had given a bill of lading therefor. *Missouri Pac. R. Co. v. Douglass & Sons*, 16 Am. & Eng. R. R. Cas. 98.

Recitals in Bill of Lading that Goods Have Been Delivered to Carrier.—When the agent of a railroad company signs a bill of lading for goods not delivered, the company is not estopped to show that the goods have never in fact come into the company's hands. *Robinson v. Memphis, etc., R. R. Co.*, 6 Am & Eng. R. R. Cas. 598.

But a railroad company is generally estopped by a recital in the bill of lading to the effect that the goods are in possession of the company from showing them to be in the hands of another. *St. Louis & Iron Mt. R. Co. v. Larned*, 6 Am. & Eng. R. R. Cas. 486.

CHICAGO & ALTON RAILROAD COMPANY

v.

DAWSON.

(79 *Missouri Reports*, 296.)

A contract by which a railroad company undertakes to relieve itself of all liability for damages occasioned by any delay in transportation, and to impose them upon the shipper, will be effectual to protect the company only against the consequences of delays not caused by its own negligence.

It is the duty of a railroad company to provide sufficient facilities and means of transportation for all freight which it should reasonably expect will be offered, but it is not bound to provide in advance for extraordinary occasions, nor for an unusual influx of business which is not reasonably to be expected.

If a railroad company receives property for transportation without any agreement to the contrary, it thereby undertakes to carry and deliver it within a reasonable time, regardless of any extraordinary or unexpected pressure of business upon it.

Appeal from Audrain Circuit Court.

Macfarlane & Trimble, for appellant.

Forrist & Fry, for respondent.

HOUGH, C. J.—This was an action for damages alleged to have been caused by delay in the shipment of three cars of sheep from Centralia, Missouri, to Venice, Illinois, opposite the city of St. Louis.

It was admitted that the sheep were shipped under a special contract, by which plaintiff "agreed to assume the risk of all injuries which said sheep, or any of them, might receive or sustain from delays in the transportation thereof, and that he would assume all risks for damage of whatever kind which might be occasioned or sustained by reason of any delay in such transportation." Plaintiff testified that defendant declined to accept the sheep for transportation unless he would sign such contract,

though he did not read the contract, nor did the agent of defendant inform him as to its contents. The evidence showed that there was a delay of thirty-six hours beyond the usual time between Centralia and Venice. There was testimony as to the damages sustained by reason of the delay.

Defendant showed, by evidence, that just previous to the shipment of these sheep the bridge over the Missouri river at St. Charles was broken down, and all freight over the Wabash road to St. Louis was transferred at Mexico and carried to St. Louis over defendant's road, by reason of which an unusual amount of business was unexpectedly thrown upon defendant's road. The division superintendent testified that they took all the freight offered, and did the best they could with it; that there was such an accumulation of freight, that defendant was unable to transport it all without delay.

At the request of the plaintiff, the court gave the following instructions:

1. If the jury shall believe from the evidence in this case that plaintiff shipped, upon defendant's cars, at Centralia, the sheep mentioned in the petition, and defendant undertook to transport the same over its road to Venice, as named in said petition, and within a reasonable time, and failed to do so, or that they so undertook so to do in a careful and prudent manner, and carelessly and negligently failed so to do, and plaintiff was actually damaged, then the verdict must be for plaintiff.

2. If the jury shall find the issues in this case for plaintiff, then in determining his damages they will consider the loss of the weight of said sheep by reason of said delay in said transportation thereof, if any, together with the difference in the price or market value of the sheep at the time they should have arrived in said market, and the time in which they did arrive, if any, together with all extra cost and expenses to plaintiff by reason of such delay in said transportation, if any, he was compelled to pay and make, as well as any loss or depreciation in the market value of said sheep, if any, by reason of the careless and negligent running and management of said cars, if the jury shall find from the evidence such carelessness and negligence, and find the amount thereof and fix the same in dollars and cents, but in no event will the amount so fixed exceed the sum of \$630.90, as mentioned in plaintiff's petition.

3. Although the jury may believe from the evidence that plaintiff executed the contract offered in evidence by defendant, and for a valuable consideration, still said contract would constitute no defence to plaintiff's action, nor any mitigation of any damages that the jury may believe from the evidence in the case plaintiff may have suffered by reason of the carelessness or negligence of defendant in the premises, if the jury believe such carelessness or negligence has been shown by the evidence.

4. If the jury shall believe from the evidence that plaintiff shipped the sheep mentioned in his petition, and defendant undertook so to do, and there was no specific contract as to the time within which said transportation should be completed, and said sheep be delivered, then the law would require the same to be done and completed within a reasonable time; and if, when defendant so received and undertook such transportation, it knew it had not the facilities for the performance of its said undertaking in such time, by reason of a want of proper and sufficient means of transportation, or other causes within its control, and by reason of want of such facilities, or other causes, said undertaking of defendant was not performed within such reasonable time, then such delay would be the result of negligence on the part of defendant in the premises, and it would be liable for such damages as plaintiff might suffer from such failure to perform said undertaking, not exceeding \$630.90.

At the request of the defendant the court gave the following instruction:

If the jury believe from the evidence that at the time defendant received plaintiff's sheep for shipment, there was an extraordinary and unexpected pressure of business on defendant's road, they may take that fact into consideration as a circumstance in determining what was a reasonable time in which plaintiff's sheep should have been shipped to Venice.

The following instruction, asked by the defendant, was refused by the court:

If the jury believe from the evidence that by reason of the breaking down of the St. Charles bridge over the Missouri river, on the road of the St. Louis, Kansas City & Northern Railway Company, there was an unusual and unexpected pressure of business on defendant's road, and that defendant refused to receive plaintiff's sheep unless he would have them shipped under the contract read in evidence, and that plaintiff agreed thereto, and said sheep were shipped under said contract, then plaintiff is not entitled to any damages caused by delay in the transportation of said sheep, if such delay was occasioned by such pressure of business.

The rule is settled in this State that a carrier cannot contract for exemption from liability for loss caused by the negligence of itself or its servants. *Harvey v. Railroad Co.*, 74 Mo. 541; s. c. 16 Am. & Eng. R. R. Cas. 352; *Sturgeon v. Railroad Co.*, 65 Mo. 569; *Rice v. Railroad Co.*, 63 Mo. 314; *St. Louis, K. C. & N. Ry. Co. v. Cleary*, 77 Mo. 634; s. c. 16 Am. & Eng. R. R. Cas. 122. The effect of the special contract in the case now before us was, therefore, to relieve the defendant from liability for losses which resulted solely from such delay as was not caused by the negligence of the defendant and its servants. For all losses resulting from any delay caused by the negligence of the defendant or its servants, the defendant is liable, notwithstanding the special contract.

It is the duty of a common carrier to provide sufficient facilities and means of transportation for all freight which it should reasonably expect will be offered, but it is not bound to provide in advance for extraordinary occasions, nor for an unusual influx of business which is not reasonably to be expected. When an emergency arises and more business is suddenly and unexpectedly cast upon a carrier than he is able to accommodate, unless the carrier decline to receive the excess offered, some shippers must necessarily be delayed; yet if the carrier do receive the goods without notice to the shipper of the circumstances likely to occasion delay, or fail to obtain his assent, express or implied, to the delay, he will be bound to transport the goods within a reasonable time, notwithstanding such emergency. When the facilities of the carrier are adequate to the business reasonably to be expected, the delay caused by the emergency cannot of course be regarded as a delay caused by the negligence of the carrier. Under this view of the law, the instruction asked by the defendant, and refused by the court, should have been given, as there is no pretense that the defendant's road was not properly equipped for the transportation of its usual and ordinary business.

The first instruction given at the request of the plaintiff is faulty in allowing a recovery for a failure to transport the sheep in a reasonable time, although the delay may not have been occasioned by the negligence of the defendant. It authorizes a recovery if the defendant undertook to transport the sheep "within a reasonable time and failed to do so." This portion of the instruction is inapplicable to the case made by the pleadings and the evidence.

The second instruction for plaintiff should be modified so as to restrict the finding of the jury to the damages resulting from such delay as was occasioned by the negligence of the defendant as distinguished from the damages, if any, resulting solely from the delay caused by the unusual influx of business.

The fourth instruction given for plaintiff requires some qualification. Delay occurring as therein stated would not be a negligent delay, although, in the absence of a special contract of exemption, the defendant might be liable therefor. In view of the contract in this case, it was manifestly improper.

As the cause must be re-tried, we deem it proper to say that we regard the instruction given for the defendant as erroneous. But for the special contract set up by the defendant, the receipt of the sheep and the unqualified agreement to transport them would have imposed upon the defendant the duty to carry and deliver within a reasonable time, regardless of the extraordinary and unexpected pressure of business on defendant's road.

For the errors indicated, the judgment will be reversed, and the cause remanded. All the judges concur.

Duty of Railroad Company as to Reception of Freight when Road is Obstructed or Cars Insufficient.—Where there is a lack of cars on a line of railroad, or there is a blockade or stoppage of any kind, rendering it impossible to forward freights, it is the duty of the company to inform the shipper, so that he may elect to sell his goods at the intended point of shipment, or forward them by some other route. *Great Western R. Co. v. Burns*, 60 Ill. 284; *Helliwell v. Grand Trunk R. Co.*, 10 Biss. 170.

It appears, however, that he is not bound to do this if the obstruction is beyond his own line, and on a connecting road leading to the destination of the goods. *McCarthy v. Terre Haute & Ind. R. R. Co.*, 9 Mo. App. 159.

If the goods are perishable and the company has not the means to forward them, it should peremptorily decline to receive them. *Tierney v. New York Central & H. R. R. Co.*, 76 N. Y. 805.

Liability of Railroad Company for Delay in Transporting Freight Caused by Obstruction of Road or Insufficient Cars.—When delay occurs in the transportation of goods in consequence of a lack of cars of the road, the company is liable for the delay where it is occasioned through its fault. *Illinois Central R. R. Co. v. Cobb*, 64 Ill. 128; *Chicago & Alton R. R. Co. v. Thrapp*, 5 Bradw. App. 502.

But not when the delay is not the carrier's fault. *Taylor v. Great Northern R. R. Co.*, L. R. 1 C. P. 385.

And when the delay is shown to be partly not the fault of the carrier, the plaintiff must, in order to recover, specifically show the damage to him following from delay which was the carrier's fault. *Detroit, etc., R. R. Co. v. McKenzie*, 9 Am. & Eng. R. R. Cas. 15.

Order of Transmission of Freight.—Where there is a blockade of freight, goods should be sent forward in the order of time that they were received by the carrier for transportation. *Acheson v. New York Central & H. R. R. Co.*, 61 N. Y. 652; *Page v. Great Northern R. Co.*, 2 Ir. Rep. (C. L.) 288.

But in exceptional instances, as, for example, when it is important to forward relief for sufferers from flood or fire, the rule may be dispensed with. *Michigan Central R. R. Co. v. Burrows*, 83 Mich. 6.

Statutory Penalties for Failure to Forward Freights.—In some States statutes have been passed imposing penalties for a failure to forward goods promptly. Such statutes are constitutional. *Katzenstan v. Raleigh & G. R. Co.*, 6 Am. & Eng. R. R. Cas. 464; *Whitehead v. Wilmington, etc., R. R. Co.*, 9 Am. & Eng. R. R. Cas. 168.

A company is not relieved from liability for the penalty under such statute because it has been unable to procure cars on account of the large accumulation of freight. *Keeter v. Wilmington, etc., R. R. Co.*, 9 Am. & Eng. R. R. Cas. 165.

But when by the terms of the bill of lading the goods are to be forwarded "at carrier's convenience," and owing to the fault of a connecting line the company is unable to furnish cars to meet an unusual heavy demand, it is not liable to the statutory penalty. *Whitehead v. Wilmington, etc., R. R. Co.*, 9 Am. & Eng. R. R. Cas. 168.

DIXON

v.

CHICAGO, R. I. & P. RY. CO.

(*Advance Case, Iowa, October 21, 1884.*)

In an action for loss caused by depreciation in the value of a cargo of apples shipped by plaintiff over defendant railroad company's line, the court instructed the jury that "it was the duty of the defendant, when the apples

were loaded, to send them out on the first train going to the point of consignment, if the exigencies of their freight traffic would permit; and if the apples were known to the defendant to be perishable freight, then it was its duty to transport them, even to the exclusion of other general freight not of a perishable nature." *Held*, that, in so far as the instruction required the apples to be moved the day of their receipt, and permitted *no excuse for delay whatever*, it was erroneous.

APPEAL from Mahaska District Court.

Action to recover upon a contract for the transportation of a car-load of apples from Oskaloosa to Council Bluffs. There was a judgment upon a verdict for plaintiff. Defendant appeals.

M. A. Low, for appellant.

Bolton & McCoy, for appellee.

BECK, J.—There was evidence tending to prove the apples were delivered to defendant and loaded upon one of its cars at Oskaloosa on the 19th day of April, 1881, and were not delivered to the consignee at Council Bluffs until the 3d day of May following. When received by the consignee, many of them were rotten, but when delivered to defendant, they were in good condition. The evidence tends to show, further, that the delay in the transportation of the fruit was the cause of its loss, and that, had it been delivered in the usual time occupied in the transportation of property between the two cities, it would have been received by the consignee in good order. The cause of the delay arose from the prevalence of a flood in the Missouri river, which so overflowed the part of the city of Council Bluffs in which defendant's freight depot was located, that it could not be approached by cars. The evidence tends to show that if the apples had been sent forward on the day they were received by defendant, the car containing them would have reached Council Bluffs before the water had cut off approach to the depot.

As applicable to the evidence, the district court gave to the jury an instruction in the following language: "(2) It was the duty of the defendant, when the apples were loaded, to send them out on the first freight train going out on the route to Council Bluffs, if the exigencies of their freight traffic would permit; and, if the apples were known to the defendant to be perishable freight, then it was its duty to transport them, even to the exclusion of other general freight not of a perishable nature." The instruction, in our opinion, is erroneous. It may be that if the exigencies of defendant's freight traffic had permitted the immediate transportation without delay, the diligence imposed by law would have required the apples to be sent by the very next train. There should be no delay without cause. Therefore, if the demands of defendant's business, and the arrangement of its trains as to time, permitted the moving of the apples on the same day they were received by the defendant, it should have been done. This part

of the instruction, in this view, is correct. The error rests in the other part, which holds that defendant, if he knew the apples were perishable, was bound to transport them on the day of their receipt, even though other freight, not of a perishable nature, was delayed. This instruction required the apples to be moved the day of their receipt, and permits no excuse for delay. The demands of the business of defendant, the time of the starting of trains, contracts and obligations to first transport other property before received, in short, all matters which might control defendant, and be considered as sufficient to determine its diligence, are to be disregarded, and the defendant is to be held liable for negligence absolutely, without a ground of defence. The law will recognize no rule operating with such hardship. The fact that the apples were perishable may have imposed an obligation for the exercise of care and diligence of a high order to expedite their transportation. But it cannot be held that defendant was absolutely and unconditionally bound to move the apples forward on the day they were received, without regard to other matters to which we have referred. In support of these views, see *Sweatland v. Boston & A. R. Co.*, 102 Mass. 276; *Ballentine v. North Mo. Ry. Co.*, 40 Mo. 491; *Galena & C. R. Co. v. Rae*, 18 Ill. 488.

Other questions involved in this case, upon some of which we are not fully agreed, need not be considered, as, for the error above pointed out, the judgment of the district court must be reversed.

Obligation to Immediately Forward Perishable Goods.—A railroad company receiving perishable goods for transportation is bound to ship them immediately. If it has not the facilities for their immediate transportation, it is its duty not to accept the goods. *Tierney v. New York Central & H. R. R. Co.*, 76 N. Y. 805.

And see *McGraw v. Baltimore & Ohio R. Co.*, 9 Am. & Eng. R. R. Cas. 188.

LITTLE ROCK & FORT SMITH RAILWAY COMPANY

v.

HUNTER.

(42 *Arkansas Reports*, 200.)

A railroad company is liable as a common carrier when goods are delivered to and accepted by it for immediate transportation in the usual course of business. If they are to await further orders from the shipper before carriage, it incurs, at the utmost, the liability of a warehouseman.

When goods are left with a railroad company's agent at their depot to be kept until the owner should be prepared to proceed on his journey, and to be returned on request if he should not go, then the company becomes a mere gratuitous bailee, provided the agent can bind it at all by the reception of goods under such circumstances.

APPEAL from Franklin Circuit Court.

J. M. Moore, for appellant.

L. L. Wittich, for appellee.

SMITH, J.—The plaintiff in this action recovered judgment against the railroad company for the value of a box of household goods, alleged to have been left in its depot for safe keeping until the plaintiff should be ready to take the train. It was averred that the box was not re-delivered upon request, but was lost by the defendant's negligence. The action having originated before a justice of the peace, no formal answer was filed, but the defence seems to have been a general denial of the plaintiff's cause in action.

On the trial the plaintiff testified that on a certain day she came in from the country to Ozark, intending to take the defendant's train on her way to Tennessee, provided she should receive a certain remittance of money she was expecting by mail; that she went to the depot and deposited her trunk and box on the platform; that about that time the train came along, and the baggage-men were in the act of putting her effects aboard, when she interfered, and told them she was not going by that train, as she would not have time to go to the post office to see if her money had come; that she then spoke to the assistant agent at the depot, and inquired if her things could remain there until she was ready to go, and he assured her they would be perfectly safe. She then went to a boarding-house, and never did go to Tennessee. Three days later she sent for and received her trunk, which appears to have been in the depot. About three weeks afterwards she inquired of the assistant agent whether any charges for storage on goods were made, and was informed the company never charged for storage.

The defendant's agents swore they had no knowledge of the box, and had never seen or heard of it until a short time before the commencement of the action; and that the company did not transact a warehouse business, but only received goods to ship as freight or baggage.

The following prayers of the defendant were refused:

1. "If the jury find from the evidence that the plaintiff deposited the box of goods with the agents of the company in the depot warerooms, to remain there until such time as she should be ready to take the train, and become a passenger, with the view that it should be carried with her on the journey, and to be returned to her in case she did not become a passenger without shipment to any point, then the company is not liable for the goods, either as baggage or freight, and can be liable only as special bailee."

2. "That unless it is proved that the defendant kept a warehouse for the general storage and forwarding of goods, and had

corporate power and authority to do so, then the law is that the agents of the company could not bind the company for the safe keeping of goods which were not received either as freight or baggage."

3. "That the defendant is not liable for goods as special bailee without proof that the goods were lost through the negligence of the defendant. The fact that the goods were lost, without other evidence of negligence, is not sufficient to make the company liable as special bailee."

And the court gave the following directions of its own motion:

First. "The jury are instructed that the defendant corporation is a common carrier of goods, and is an insurer for the safe delivery of property intrusted to them for transportation."

Second. "The court instructs the jury that if they believe from the evidence that the box containing the goods sued for was received into the exclusive possession of the agents of the defendant, who, when they received said goods, were acting in the usual course of their employment, and that the same were received for the purpose of being shipped, then they will find for the plaintiff the value of said goods."

The court below evidently misconstrued the nature of the action and the purport of the evidence. Its charge is based upon the assumption that the goods were delivered to the defendant for transportation. Yet this was not alleged in the complaint, nor is there a syllable of testimony in the record to support this view. A railroad company is responsible as a common carrier only when goods are delivered to and accepted by it for immediate transportation in the usual course of business. If they are to await further orders from the shipper before carriage, it incurs, at the utmost, the liability of a warehouseman. *O'Neil v. N. Y. Cent. & H. R. R. Co.*, 60 N. Y. 138.

Of course, a warehouseman is not an insurer. He is only bound to ordinary and reasonable care of the commodity intrusted to him, and is not even liable for thefts, unless they have been occasioned by his own negligence, nor for accidental fires. Story on Bailments, 8th ed., pp. 444, 449.

If, again, the goods were left with the company's agents, to be left until she should be prepared to proceed on her journey, and to be restored to the depositor upon request, then the company became a gratuitous bailee, provided its agents could bind it at all by the reception of the goods under such circumstances. The first prayer of the defendant should have been granted.

Reversed for a new trial.

Company is Liable as Common Carrier for Goods in Store when Received for Immediate Transportation.—A railroad company is ordinarily held liable as a common carrier for all goods actually received by it for immediate transportation, even though they may for a time be stored in

the station or warehouse of the company. *Hart v Baxendale*, 6 Exch. 700; *Merritt v. Old Colony R. Co.*, 11 Allen, 80; *McHenry v. Railroad Co.*, 4 Haring (Del.), 448; *Illinois R. Co. v. Smyser*, 38 Ill. 354; *Hickox v. Naugatuck R. Co.*, 31 Conn. 281; *Pittsburgh, C. & St. L. R. Co. v. Barrett*, 3 Am. & Eng. R. R. Cas. 256; *Marquette, etc., R. R. Co. v. Kirkwood*, 9 Am. & Eng. R. R. Cas. 85.

Company Not Liable as Common Carrier for Goods in Store Not Received for Immediate Transportation.—But when goods are received by a railroad company with no express orders to forward the same at once, and something remains to be done to complete the contract of transportation and they are then stored, the company is liable as a warehouseman only, if to that extent. *Michigan R. Co. v. Schurz*, 7 Mich. 515; *Watts v. Boston & Lowell R. Corp.*, 106 Mass. 467; *Nichols v. Smith*, 115 Mass. 332; *Judson v. Western R. Co.*, 4 Allen, 520; *Barron v. Eldredge*, 100 Mass. 455; *St. Louis R. Co. v. Montgomery*, 39 Ill. 335; *McDonald v. Western R. Co.*, 34 N. Y. 497; *O'Neill v. New York Central, etc., R. Co.*, 60 N. Y. 138.

But see *Michaels v. New York, etc., R. Co.*, 30 N. Y. 564.

Company Not Liable as Common Carrier Until Bill of Lading is Given.—Until a bill of lading is given for goods, no liability can be said to attach as a common carrier. Custom will not alter this rule. *Brown v. Atlanta & Air Line R. Co.*, 13 Am. & Eng. R. R. Cas. 479; *Missouri Pac. R. Co. v. Douglass & Sons*, 16 Am. & Eng. R. R. Cas. 98.

RICHARDSON

v.

CHICAGO & N. W. RY. CO.

(*Advance Case, Wisconsin, October 14, 1884.*)

A railroad company, as a common carrier, and independent of any contract between it and a shipper, is not liable for loss and expense occasioned by its failure to have cars in readiness to ship live-stock on the day that the shipper notified the agent of the company he would tender them for shipment, when it is not shown that the notice given was a "reasonable notice" within the meaning of Rev. St. of Wisconsin, Sec. 1798, or what the general custom of the company as to receiving and shipping live-stock was.

APPEAL from Circuit Court, Sauk county.

The complaint alleges, in effect, the incorporation of the defendant under the laws of this State, and as being possessed with all the privileges of railroad companies, and subject to all the liabilities and responsibilities of common carriers of passengers and freight; that October 13th, 1882, the plaintiff, being a resident at Ableman, in Sauk county, Wisconsin, a station on defendant's road, and there engaged in the business of buying and shipping stock to the Chicago market for sale, and being fully apprised as to the state of the market at Chicago *for live-stock* and prices, proceeded to buy for that market 180 hogs (three car-loads), to be loaded on defendant's cars at Ableman, and shipped to Chicago market; that to be certain about cars, the station agent at Ableman, who had charge of such matters, *was notified* about three days in

advance, and he informed the plaintiff he should have the cars on the following Monday, ready to load Tuesday; and the plaintiff, having no notice whatever that there would be any trouble in getting said cars, and relying upon the duty of the defendant, as a common carrier of freight, to furnish cars when ordered or requested so to do at the time set, and the assurance of said agent that said cars would be provided, the plaintiff purchased the stock necessary to fill said cars, to wit, 180 hogs, and had the same in the defendant's stock-yards at said station ready to be loaded at the time set and agreed upon, and was there ready to load the same; but the defendant, disregarding its duty in the premises as a common carrier of freight, and its assurance and agreement to and with the plaintiff that said cars would be on hand at the time ordered, neglected and refused to provide said cars at the time appointed, and as requested and promised, for several days, to wit, about four days, and consequently the plaintiff finally arrived at Chicago with said stock about four days later than he would have done had said cars been provided as ordered and agreed, whereupon, by reason of the premises, the plaintiff was obliged to care for and feed said stock for several days more than he ought to have been obliged to, at a cost of \$100; and was also greatly damaged by the difference in the state of the market at Chicago, whereby the plaintiff realized \$500 less for his said stock than he otherwise would. Wherefore, the plaintiff demanded judgment for \$600 and costs. To this complaint defendant demurred, on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was overruled, with leave to answer on the merits, and from the order overruling the demurrer this appeal is brought.

Lusk & Perry, for respondent.

W. F. Vilas, for appellant.

CASSODAY, J.—Whether a railway company is under the same obligations to furnish cars for, and receive, safely carry, and store live-stock as other ordinary inanimate freight, is a question upon which much has been written, and some diversity of opinion has been expressed. It is not necessary here to analyze the adjudged cases, nor indicate the weight of reason or authority. *Betts v. Farmers' L. & T. Co.*, 21 Wis. 81, was an action for injuries caused by the carrier's negligence in carrying the plaintiff's cattle in a car with defective and imperfectly fastened doors, which were thrown open by the motion of the cars, so that the cattle escaped. The cattle were shipped under a special contract, which, among other things, provided that the company should "not be liable for loss in jumping from the cars." In that case, Dixon, C. J., giving the opinion of the court, said: "As to this species of property, we think it competent for the carrier to contract the owner shall assume all risk of damage or injury, from whatever cause, hap-

pening in the course of transportation." See also *C. & N. W. R. Co. v. Van Dresar*, 22 Wis. 512; *Morrison v. Phillips & Colby Constr. Co.*, 44 Wis. 405. This proposition seems to cover more ground than the point actually decided in that case, but the English cases cited by the learned Chief Justice seem to sustain the proposition. To them others may be added. *McCance v. London & N. W. Ry. Co.*, 7 Hurl & N. 477; *Gannell v. Ford*, 5 Law T. (N. S.) 604; *Robinson v. Great Western Ry. Co.*, 35 L. J. C. P. 123; *Harrison v. London, etc., Co.*, 2 Best & S. 122; *Manchester v. Brown*, 50 Law T. Rep. (N. S.) 281. But there are cases even in England which seem to hold a contrary doctrine. *McManns v. Lancashire, etc., Co.*, 4 Hurl. & N. 327; *Allday v. Great Western Ry. Co.*, 5 Best & S. 903; *Gregory v. West Midland Ry. Co.*, 2 Hurl & C. Exch. 944; *Rooth v. Northeastern Ry. Co.*, L. R. 2 Exch. 173; *Doolan v. Directors*, L. R. 2 App. Cas. 792; *Moore v. Great S. & W. Ry. Co.*, L. R. 10 Ir. Com. Law 65.

Just how far the cases cited were controlled by the presence or absence of local statutes is not necessary here to determine. It is well settled that a carrier of ordinary inanimate freight cannot by any agreement, however plain and explicit, wholly relieve itself from all liability whatsoever resulting from its own negligence. *Black v. Goodrich Transp. Co.*, 55 Wis. 319. Just the extent that a carrier of such inanimate freight may by express contract exempt itself from liability for its own negligence need not here be determined. Certainly there is a broad distinction between the risks incident to the carriage of such ordinary inanimate freight, and that of live animals having instincts, habits, propensities, wants, necessities and powers of locomotion. Requisite care in case of the transportation of such live-stock, therefore, necessarily implies food and water periodically, and at times especial care and shelter outside the vehicle of carriage. All these things would require help, appliances, conveniences and extra arrangements not requisite in the case of ordinary inanimate freight, which a carrier might be unable or unwilling to furnish, and yet, if furnished by the owner of such live-stock, and the risk incident to them assumed by such owner, the carrier might be able and willing to undertake such transportation. And yet, with all reasonable care, it would be impossible to secure at all times absolute safety in the transportation of such live animals. This broad distinction between that class of freightage and ordinary inanimate freight has frequently been observed by the courts. *Blower v. Great Western Ry. Co.*, L. R. 7 C. P. 655; *Shir. Lead. Cas. No. 22*, p. 50; *Clarke v. Rochester, etc., Ry. Co.*, 14 N. Y. 570; *Penn v. Buffalo, etc., Ry. Co.*, 49 N. Y. 204; *Cragin v. New York Central Ry. Co.*, 51 N. Y. 61; *Holsapple v. Rome, Watert. & Ogdensb. R. Co.*, 3 Am. & Eng. Ry. Cas. 486; *Smith v. New Haven, etc., R. Co.*, 12 Allen, 581; *Evans v. Fitchburg R. Co.*, 111 Mass. 142; *Michigan*

S. & N. Ind. R. Co. v. McDonough, 21 Mich. 189; **Lake Shore & Michigan Southern R. Co. v. Perkins**, 25 Mich. 329. There would certainly seem to be no good reason why a carrier might not by express contract exempt itself from damage caused wholly, or perhaps in part, by the instincts, habits, propensities, wants, necessities, vices, or locomotion of such animals. *Id.* As to injury from such causes, the common law liability and obligation do not seem to attach, certainly not with the same rigidity as they do to ordinary inanimate freight. *Id.* Thus, in a late case in Minnesota, it is held that "a railroad corporation which *undertakes* to transport live-stock for hire for such persons as choose to employ it, assumes the relation of a common carrier, *with such modifications of the common law liability* of carriers as arise from the nature of the animals, and their capacity for inflicting injury upon themselves and upon each other." **Moulton v. St. Paul, M. & M. Ry. Co.**, 12 Am. & Eng. Ry. Cas. 13. To these things may well be added other things incident to live-stock. As to the extent to which a carrier may limit its liability for injury caused by its own negligence, see the valuable notes to **Holsapple v. Rome, Watert. & Ogdensb. R. Co.**, 3 Am. & Eng. Ry. Cas. 487, and **Harrison v. Missouri Pacific Ry. Co.**, 7 Am. & Eng. Ry. Cas. 382; **Peek v. North Staffordshire Ry. Co.**, 10 H. L. 473; **Shir. Lead. Cas. No. 23**, p. 51.

Whether the common law liability and obligation do not attach when such live-stock has been received by the carrier and is in the course of transportation, and the cause of the injury is wholly unconnected with such live-stock, and in no way traceable to the animal, is a question we prefer to leave open for future consideration. Manifestly, there is no special contract here alleged in the complaint. True, it is alleged that the agent was notified, and that he informed the plaintiff that he should have the cars on the day named; but there are no sufficient allegations to constitute any mutual obligations or binding contract. This is frankly admitted by the learned counsel for the plaintiff. Since the action is not based upon contract, the plaintiff must recover, if at all, by reason of the defendant's liability as a common carrier, upon mere notice to furnish cars and a readiness to ship at the time notified. Did such notice and readiness to ship create such liability? We have seen that a carrier of live-stock may, to at least a certain extent, limit its liability. Whether the defendant was accustomed to so limit its liability or to carry all live-stock tendered upon notice, without restriction, does not appear from the record. If it was accustomed to so limit, and the limitation was legal, it should, at least, have been so alleged, together with an offer to comply with the customary restriction. If it was accustomed to carry all live-stock offered upon notice and tender, and without restriction, then it would be difficult to see upon what ground it could discriminate

against, by refusing to do for him what it was constantly in the habit of doing for others.

But the difficulty here is that the plaintiff has failed to allege facts sufficient to bring his case within the rule suggested. He has not only failed to allege any such custom or holding out on the part of the defendant, but has failed to allege the facts requisite to create liability for failure to furnish cars for the carriage of ordinary inanimate freight. The statutory requisition is, that "every railroad corporation shall, upon *reasonable* notice, *when within its power to do so*, furnish *suitable* cars to any person applying therefor for the transportation of freight." Rev. St., Sec. 1798. Here the complaint is silent as to the notice given being a "reasonable" notice within the meaning of the statute. It may possibly be inferred, as urged by counsel, from the alleged assurance of the agent, that the cars would be ready on the day named; but still the complaint lacks the essential allegation that it was at the time within the power of the defendant to "furnish suitable cars" on the day named. For the reasons given, the demurrer should have been sustained, with leave to the plaintiff to amend his complaint.

The order of the circuit court is reversed, and the cause is remanded for further proceedings according to law.

In England, Carriers of Live-Stock not Liable as Common Carriers.—In the English courts carriers of live-stock are not considered to be common carriers, and are not held accountable as such. *McManus v. Lancashire, etc., R. Co.*, 2 H. & N. 693; *Same v. Same*, 4 H. & N. 328; *Palmer v. Grand Junction R. Co.*, 4 M. & W. 749; *Paddington v. South Wales R. Co.*, 38 Eng. L. & Eq. 432; *Carr v. Lancashire, etc., R. Co.*, 4 H. & N. 328; *Kendall v. London R. Co.*, L. R. 7 Exch. 878.

Law in Michigan.—In Michigan, carriers of live-stock are not held to the liability of common carriers. *Michigan R. Co. v. McDonough*, 21 Mich. 165; *Lake Shore & M. S. R. Co. v. Perkins*, 25 Mich. 329, overruling *Michigan, etc., R. Co. v. Hall*, 6 Mich. 248, and *Great Western R. Co. v. Hawkins*, 18 Mich. 427.

Law in Kentucky and Tennessee.—In Kentucky and Tennessee, carriers of live-stock are not insurers, though if an injury occurs to an animal *en route*, the *prima facie* presumption is that the accident has been occasioned by the fault of the company. *Louisville, etc., R. Co. v. Hedger*, 9 Bush. 645; *Baker v. Louisville & N. R. Co.*, 10 Lea (Tenn.), 804; *Baker & Stratton v. Louisville & N. R. Co.*, 10 Lea (Tenn.), 804; s. c., 16 Am. & Eng. R. R. Cas. 149.

Carriers of Live-Stock Generally Held Liable in United States as Common Carriers.—In the United States courts and in most of the States, however, railroad companies are held to the full liabilities of common carriers when transporting live-stock, except that they are not liable for any damage or loss growing out of the vicious propensities of the animals themselves.

United States Courts.—*Michigan Central R. Co. v. Myrick*, 9 Am. & Eng. R. R. Cas. 25.

Alabama.—*South Alabama, etc., R. Co. v. Henlein*, 52 Ala. 606

California.—*Agnew v. The Contra Costa*, 27 Cal. 425.

Georgia.—*East Tenn., etc., R. Co. v. Whittle*, 27 Ga. 535.

Illinois.—*Ohio, etc., R. Co. v. Dunbar*, 20 Ill. 628; *St. Louis, etc., R. Co. v. Dorman*, 72 Ill. 504.

Indiana.—*Lake Shore, M. S. & R. Co. v. Bennett*, 6 Am. & Eng. R. R. Cas. 891.

Iowa.—*German v. Chicago, etc., R. Co.*, 88 Iowa 127; *McCoy v. Keokuk, etc., R. Co.*, 44 Iowa 424.

Kansas.—*Kansas, etc., R. Co. v. Reynolds*, 8 Kans. 623; *Kans., etc., R. Co. v. Nicholls*, 9 Kans. 285.

Louisiana.—*Peters v. New Orleans, G. & St. N. R. Co.*, 16 La. Ann. 223.

Massachusetts.—*Smith v. New Haven, etc., R. Co.*, 12 Allen 531; *Evans v. Fitchburg R. Co.*, 111 Mass. 142.

Minnesota.—*Moulton et al. v. St. Paul, M. & M. R. Co.*, 12 Am. & Eng. R. R. Cas. 13.

Mississippi.—*Chicago, St. L. & N. O. R. Co. v. Abelo*, 60 Miss. 1017.

Missouri.—*Clark v. St. Louis, K. C. & N. R. Co.*, 64 Mo. 440.

Nebraska.—*Atchison, T. & S. F. R. Co. v. Washburn*, 5 Neb. 117.

New Hampshire.—*Rexford v. Smith*, 52 N. H. 355.

New York.—*Cragin v. New York, etc., R. Co.*, 51 N. Y. 61; *Penn. v. Buffalo, etc., R. Co.*, 49 N. Y. 204; *Harris v. Northern, etc., R. Co.*, 20 N. Y. 282; *Mynard v. Binghamton & N. Y. R. Co.*, 71 N. Y. 180; *Holsapple v. Rome, W. & O. R. Co.*, 8 Am. & Eng. R. R. Cas. 487.

Ohio.—*Wilson v. Hamilton*, 4 Ohio St. 722; *Welsh v. Pittsburgh, etc., R. Co.*, 10 Ohio St. 65.

Pennsylvania.—*Ritz v. Penna. R. Co.*, 3 Phila. 82; *Powell v. Penna. R. Co.*, 82 Pa. St. 414.

South Carolina.—*Bamberg v. South Carolina R. Co.*, 9 S. C., 61.

Vermont.—*Kimball v. Rutland, etc., R. Co.*, 26 Vt. 247.

West Virginia.—*Maslin v. Baltimore & Ohio R. Co.*, 14 West Va. 180.

Wisconsin.—*Morrison v. Phillips & Colby Construction Co.*, 44 Wisc. 405.

Contracts to Furnish Cars to Forward Live-Stock.—As to the construction of contracts on the part of a railroad company to furnish rolling-stock to forward cattle by a certain time, and as to the liability of the company under such contracts. see the following authorities: *Phil., W. & B. R. Co. v. Lehman*, 6 Am. & Eng. R. R. Cas. 194; *Harrison v. Missouri Pacific R. Co.*, 7 Am. & Eng. R. R. Cas. 382; *Ayres et al. v. Chicago & N. W. R. Co.*, 16 Am. & Eng. R. R. Cas. 171; *Richardson v. Chicago & N. W. R. Co.*, 16 Am. & Eng. R. R. Cas. 172.

QUARRIER

v.

BALTIMORE & OHIO R. R. Co.

(20 West Virginia Reports, 424.)

The Baltimore & Ohio Railroad Co. has, by the legislature of West Virginia, become a domestic corporation in that State. A suit instituted against it by a citizen in the State court cannot, therefore, be removed into the United States court.

A circuit court does not err in refusing to remove a cause to the Circuit Court of the United States, where no bond is filed other than an incomplete one having no penalty named therein.

When a married woman brings an action for loss of her own property, and it does not appear upon the face of the declaration that she is a married woman, the question of her right to maintain the action can only be raised by plea, and not by motion to exclude the evidence.

Plaintiff delivered to a servant of a railroad company, who had frequently shipped goods for her before, a basket of clothes for transportation. He

stated that he had shipped the basket, but neither the plaintiff nor any one for her ever received it. *Held*, that the plaintiff was entitled to recover from the company whatever she proved the basket to be worth.

Interest runs from the date of judgment and not from the date of verdict.

WRIT of error and *supersedeas* to a judgment of the Municipal Court of Wheeling, rendered on the 14th day of January, 1880, in an action in said court therein pending, wherein Mary D. Quarrier was plaintiff, and the Baltimore & Ohio Railroad Company was defendant, allowed upon the petition of said company.

Daniel Lamb and Henry M. Russell, for plaintiff in error.

Caldwell & Caldwell, for defendant in error.

The Baltimore & Ohio Railroad Company is a resident corporation of West Virginia. *B. & O. R. R. Co. v. Gallahue*, 12 Gratt. 655; *Goshorn v. Supervisors*, 1 W. Va. R. 308; *Supervisors Marshall Co. v. B. & O. R. R. Co.*, 3 W. Va. R. 319; *State v. B. & O. R. R. Co.*, 15 W. Va. 362; *Mahany v. Kephart*, 15 W. Va. R. 609; *B. & O. R. R. Co. v. Wightman*, 29 Gratt. 431.

Defendant in error being a married woman had a right to sue at law. *Stockton v. Farley*, 10 W. Va. R. 178; *Duress v. Horn-effer*, 15 Wis. 195; *Faddish v. Woollomes*, 10 Kans. 89; *Jones v. Jones*, 19 Iowa, 236 and 243; *Kramer v. Conger*, 16 Iowa, 437, 438; *Radford v. Carwile*, 13 W. V. 660.

JOHNSON, J.—The plaintiff brought her suit in trespass on the case on the 10th day of June, 1879, in the Municipal Court of Wheeling against the defendant, claiming \$600 for the loss of certain clothing described in the declaration. She claimed that the clothing was shipped from Deer Park Hotel, which was owned and kept by defendant, over the defendant's road, to her home in Wheeling, and lost by said defendant. The declaration was in the usual form. The defendant demurred to the declaration and each count thereof, assigning no grounds of demurrer; and the court seeing none overruled said demurrer, and defendant entered a plea of not guilty. At the same term defendant filed its petition praying a removal of the case to the Circuit Court of the United States; but the bond filed with the paper was informal and deficient, having no penalty named therein. This defect, however, was not noticed at the time. The court refused to enter an order to remove the case, and the defendant excepted.

The defendant also demurred to the declaration, which demurrer was overruled by the court. On the 23d day of December, 1879, the case was tried before a jury; and after the jury had heard the evidence, the defendant demurred thereto, in which demurrer the plaintiff joined; and subject to the demurrer to the evidence the jury rendered a verdict in favor of the plaintiff for \$584.97 principal and interest.

On the 11th day of January, 1880, the court, having maturely considered the demurrer to evidence, decided in favor of the plaintiff, and entered a judgment for the said amount of \$584.97 damages, as assessed by the jury, with interest thereon *from the 23d day of December, 1879.*

To this judgment a writ of error and *supersedeas* was granted.

The evidence, which is all certified, shows that the plaintiff was a married woman, the wife of Hullihen Quarrier, and was living with her husband; that the goods lost consisted of her own personal wearing apparel; that at the time of her loss she was boarding at Deer Park Hotel, which hotel was at the time owned and kept by the defendant; that the loss occurred in August, 1874; that she was, while boarding at the hotel, in the habit every week of sending by the defendant's road to her home in Wheeling, to her laundress, a basket containing her clothing, for the purpose of having them laundried; that on the 24th of August of that year she gave her basket of clothing as usual to the porter to have it sent to Wheeling; that she sent to the office on that day, as she had been doing, for a tag to mark it, and received the tag, and put it on the basket marked, locked the basket and put it in the hands of one of the porters of the hotel, who had always taken it from her, and saw him take it out of the room; that she saw the basket put on the wagon which was used for the purpose of carrying packages for the guests of the hotel; that her packages were sent off on this wagon and brought back on it; that she never saw the basket afterwards. She proved the contents of the basket, and testified that they were worth the amount found by the jury. The basket was directed to H. Quarrier, Wheeling, W. Va. She says that she tried to take the testimony of the porter, whose name was King, and who took the basket away; but "they got him away." On cross-examination, she said that the tag sent her from the office, which she put on the basket, had on it "B. & O. R. R. Co., Deer Park Hotel," and was the same kind they had given her on other occasions when she had sent the basket to Wheeling. She got the basket ready, and saw it start in time to catch the train west. After it had gone, she met the porter, who said: "I got your basket off all safe, Mrs. Quarrier." No objection was made to the last answer. She sent the basket to Wheeling every week she was at Deer Park that summer, and also every week she was there the summer before.

Another witness, Thomas Dickson, an employé of the defendant at Wheeling, testified that Mr. Quarrier inquired for the basket, and he had heard that a basket was lost. It was his duty to deliver such package; if it had been received, he would have delivered it.

Henry R. Brown was a drayman in Wheeling. He went to the Baltimore & Ohio Railroad depot to receive a basket for Mr.

Quarrier, but did not find it. He had on former occasions handled the basket more than once. He went a number of times for the basket at Mr. Quarrier's request, but could not get it.

This was substantially all the evidence in the case. The defendant moved to exclude the entire testimony of Mary D. Quarrier, which motion was overruled, and defendant excepted. Defendant thereupon moved the court to exclude all testimony of the said Mary D. Quarrier, the plaintiff, which referred to the value of the contents of the basket alleged to be lost. The court overruled the motion, and defendant again excepted.

The first error assigned is the refusal of the court on petition of defendant to remove the case to the Circuit Court of the United States. This was not error, for the reasons assigned in *P. W. & Ky. R. R. Co. v. B. & O. R. R. Co.*, 17 W. Va. 812; s. c. 10 Am. & Eng. R. R. Cas. 444; and *Henen v. Same*, *Id.* 881; s. c. 9 Am. & Eng. R. R. Cas. 496.

Even had the case under the law been removable, the court did not err in refusing the prayer of the petition, because no bond as required by law was filed, the paper filed as a bond, being incomplete, having no penalty named therein.

The next error assigned is the overruling of the demurrer to the declaration and each count thereof. No ground of demurrer was assigned in the court below, and none is here assigned, and this court, perceiving no objection to the declaration, the demurrer was properly overruled.

It is also assigned as error, that the court refused to exclude the plaintiff's testimony, and also refused to strike out that portion thereof which related to the value of the goods alleged to have been lost. This, counsel say in the assignment of error, is intended to raise the question whether, in a case like this, a married woman can maintain a suit at law to recover the value of her own property lost by the defendant. If any doubt existed as to the right of Mrs. Quarrier to maintain this action, the question of her right to sue could not be raised by a motion to exclude her evidence, in which it appears that she is a married woman. Such a question could only have been raised by plea. 1 Chitty Pl. 465 and cases cited.

The last assignment of error is, that the court gave judgment on the demurrer in favor of the plaintiff. It appears from the evidence that the basket of clothing was delivered to a servant of the defendant to be shipped over its road to Wheeling; that this servant was the same person who had repeatedly shipped it for her, and who said on this occasion that he had shipped it for her; that neither she nor any one for her ever received it; and that its contents were worth all she recovered in the judgment. According to the principles decided in *Fowler v. B. & O. R. R. Co.*, 18 W. Va.; s. c. 8 Am. & Eng. R. R. Cas. 480; and *McGraw v. same*,

id.; s. c. 9 Am. & Eng. R. R. Cas. 188, and other cases decided by this court on the same subject, the judgment in this case was warranted by the evidence. The court erred in giving interest from the date of verdict instead of from date of judgment; but, as it only amounts to a few dollars, the judgment will not be reversed for that reason, but in that respect will be here corrected and affirmed with costs and thirty dollars damages according to law.

Judgment affirmed.

Jurisdiction.—For a full treatment of the question of citizenship and jurisdiction raised in the principal case, see note to *Texas Pacific Ry. Co. v. McAlister*, 12 Am. & Eng. R. R. Cas. 289.

See also *Home v. Boston & M. R. Co.*, 12 Am. & Eng. R. R. Cas. 287, and *Memphis & C. R. Co. v. Alabama*, 13 Am. & Eng. R. R. Cas. 172, which are to the same effect as the principal case.

LITTLE ROCK, MISSISSIPPI RIVER & TEXAS RAILWAY COMPANY

v.

GLIDEWELL.

(39 *Arkansas Reports*, 487.)

A. sued a railroad company for the loss of goods. The company pleaded that at the time the goods were transported it was not engaged in the carrying business, its road not being fully opened for traffic, and that its servants were not authorized to contract for their carriage. The evidence showed that the road was in process of construction; the company had no agent at the station where the goods were received, but it was in the habit of carrying for pay goods and passengers on flat cars in a construction train over the completed part of the road; that the conductor received the goods properly marked, and at the terminus they were delivered to a stranger by mistake, and thereby lost to the owner. *Held*, that the company was liable.

A carrier is liable for goods lost by misdelivery, whether the misdelivery occurs by mistake, or by fraud or impositions practiced upon it.

APPEAL from Desha Circuit Court.

L. A. Pindall, for appellant.

The railroad was not at the time a common carrier; it was in process of construction; it had no agents authorized to receive or contract for freight; it ran no trains. The employes of the contractors using the construction train had no authority to bind the company. There was no agreement or undertaking by any one to forward the freight to Collierville, Tenn.

The fact that Willard, a passenger on the train, was enabled to claim, tag and ship the freight to Hickman, was the proximate result of the carelessness of the shipper in delivering the freight to an unauthorized person without any bill of lading or contract.

Argues upon the instructions.

Martin & Martin, for appellee.

Appellant received goods from all who had them for shipment, and charged for transporting them, and hence was a common carrier. *F. & M. Bank v. Ct. F. Co.*, 23 Ohio St. 186; *Fish v. Chapman*, 2 Kelly, 349, 353. It makes no difference how they were shipped, in box or flat cars, the liabilities the same. *N. J. Ry. v. Penn*, 3 Dutcher, 100; *Redfield Law of Ry.*, vol. 2, 168.

Cite, in favor of the correctness of the instructions, *Redfield on Ry.*, vol. 2, p. 47; *Ill. Cent. Ry. v. Johnson*, 34 Ill. 389; *Mich. S. & N. Ry. v. Day*, 20 Ill. 375; *Northern R. Co. v. Fitching R. Co.*, 6 Allen, 254; *Knox v. Rivers*, 14 Ala. 249, 261.

The contract was to ship through to Collierville, and there was no exemption from liability beyond its own line. Even if it had contracted for non-liability beyond its line, it would be against public policy to allow it to contract for exemption from liability for losses happening from the negligence of its own employés. *R. Co. v. Lockwood*, 17 Wall. 357; *Bank of Ky. v. Adams Ex. Co.*, 3 Otto, 174.

There was an express contract to deliver at Collierville. *Nevill v. Smith*, 49 Vt. 255.

SMITH, J.—Glidewell sued the railroad company for the value of certain goods which it had undertaken to carry, but had negligently delivered the same to a stranger, whereby they were lost to the plaintiff. The principal defence was, that the company was not at that time engaged in the carrying business, its road not yet being fully open for traffic, and that its servants were not authorized to make contracts for the carriage of goods.

The evidence tended to show that the plaintiff had caused to be delivered to the defendant at Trippe, one of its stations, three large boxes containing wearing apparel and household goods, and marked W. M. G., Collierville, Tenn.; that the railroad was in process of construction, and only construction trains, composed of flat cars, were run to Trippe, and the company had no local agent there. But upon such trains it was in the habit of transporting persons and property, making charges and exacting payment for its services. The conductor received the goods in question without objection, and they were carried safely to Arkansas City, the eastern terminus of defendant's road. On arrival there, freight charges were demanded and received of one Milliard, a passenger on the same train, who was going to Hickman, Kentucky. The railroad agent supposed that he was the owner, and he paid the charges under the misapprehension that they were demanded on account of three trunks he had with him, or because it was necessary in order to get possession of his own baggage. However, he afterwards distinctly informed Outlaw, the company's agent at Arkansas City, that the three boxes did not belong to him, and separated them from his goods. He employed the company's

agent to superintend the shipment of his goods to Hickman, and the three boxes were put aboard the steamboat as part of them, the mistake not being discovered until they reached Hickman. Then Milliard directed the clerk of the wharf-boat to re-ship the three boxes to Arkansas City, but the boat refused to carry them back unless the freight on them was prepaid. The clerk then wrote to Outlaw that the boxes were at Hickman and subject to his orders; but Outlaw disclaimed all knowledge of them. They were burned shortly afterwards upon the wharf-boat.

The case was submitted to a jury under appropriate instructions, and they returned a verdict for the plaintiff.

The defendant, by reception of the goods under the circumstances above stated, incurred the responsibility of a common carrier. It undertook, for a reasonable reward, to carry the goods from Trippe to the eastern end of its line. It was not bound to forward them to Collierville. For, although a railroad company may by contract, express or implied, bind itself to transport persons or property beyond the line of its own road, yet no special contract of that tenor and effect is here shown, and none will be implied, as it was not within the scope of the conductor's apparent authority. *Railroad Co. v. Pratt*, 22 Wall. 124; *Perkins v. P. S. & P. R. R. Co.*, 47 Me. 595; *Lock Co. v. Railroad*, 48 N. H. 355; *Grover & Baker Sewing Machine Co. v. Mo. P. Ry. Co.*, 70 Mo. 672.

But the carrier's duty is not alone to carry safely, but also to deliver safely. He delivers goods at his peril. To deliver them to any other than the rightful owner is a violation of his contract, which the law treats as equivalent to a conversion. Nor is a misdelivery excused because it was an innocent mistake, or the result of a fraud or imposition practiced upon the carrier. *Stephenson v. Hart*, 4 Bing. 486; *Duff v. Budd*, 3 Brod. & Bing. 177; *Deverue v. Barclay*, 2 B. & Ald. 702; *Powers v. Myers*, 26 Wend. 591; *McEnter v. N. J. Steamboat Co.*, 45 N. Y. 34; *Price v. O. & S. Ry. Co.*, 50 *ib.* 213; *Winslow v. V. & M. R. Co.*, 42 Vt. 700; *Meyer v. C. & N. W. Ry. Co.*, 24 Wis. 566; *Am. Express v. Fletcher*, 25 Ind. 492; *Jeffersonville R. Co. v. Cotton*, 29 *ib.* 498; *Lou. Ex. Co. v. Cook*, 44 Ala. 468; *Houston R. Co. v. Adams*, 49 Texas, 748. Here the delivery was to a stranger, under circumstances of negligence.

Nor is the company discharged from liability because Glidewell did not, in person, or by his agent, claim the goods at the end of the transit, nor because the consignee was unknown. It should have stored the goods in its depot, giving the party entitled a reasonable time to call for and identify them. Or perhaps it might have freed itself from further responsibility in the matter by depositing the goods, for and on account of the true owner, in the warehouse of another, or in some other place where they would be

reasonably safe and free from injury. Story on Bailments, 8th ed. pp. 543, 545; Blumenthal v. Brainard, 38 Vt. 402; Fisk v. Newton, 1 Denio, 45.

Affirmed.

Liability for Misdelivery.—When a carrier misdelivers goods, he is responsible to the same extent as though he had failed to deliver them altogether. Winslow, Ward & Co. v. Vermont & Mass. R. Co., 42 Vt. 700; Rosenfield v. Express Co., 1 Woods, 181; Hawkins v. Hoffman, 6 Hill, 586; Hall v. Boston & Worcester R. Co., 14 Allen, 349; Southern Express Co. v. Dickson, 94 U. S. 549; Forbes v. Boston, etc., R. Co., 9 Am. & Eng. R. R. Cas. 76.

False Personation of Consignee.—It is immaterial that the carrier may have been deceived by fraud or forgery as to the identity of the consignee. He is in such case equally liable. Winslow, Ward & Co. v. Vt. & Mass. R. Co., 42 Vt. 700; Houston & T. C. R. Co. v. Adams, 49 Tex. 748; Viner v. New York, Alex. & G. Co., 50 N. Y. 28; American Merchants' Union Exchange Co. v. Miller, 73 Ill. 224; Price v. Oswego & Syracuse R. Co., 50 N. Y. 218.

But see Bush v. St. Louis, etc., R. Co., 3 Mo. App. 62; Teneyck v. Harria, 47 Ill. 268; Edmunds v. Merchants' Dispatch Trans. Co., 16 Am. & Eng. R. R. Cas. 250.

COUP

v.

WABASH, ST. L. & P. RY. CO.

(Advance Case, Michigan, January 28, 1885.)

A railroad company that contracts with a circus proprietor as a hirer, and not as a common carrier, to furnish men and motive power to transport his circus in special cars owned by him, said cars to be operated under the management, direction, orders and control of the said proprietor, or his agent, and by means of said employes as his agents, but to run according to the rules, regulations and time-tables of the company, from a point designated to certain other points, at greatly reduced rates, with the privilege of stopping at places and times stated to give exhibitions, is not liable as a common carrier, and may stipulate for exemption from responsibility for damages caused by the negligence of its servants while in this special employment.

ERROR to Wayne.

Griffin, Dickinson, Thurber & Hosmer and Henry M. Cheever, for plaintiff.

Alfred Russell, for defendant and appellant.

CAMPBELL, J.—Plaintiff, who is a circus proprietor, sued defendant as a carrier for injuries to cars and equipments, and to persons and animals, caused by a collision of two trains made up of his circus cars while in transit through Illinois. The court below held defendant to the common law liability of a common carrier, and

held there was no avoiding liability by reason of a special contract under which the transportation was directed. The principal questions raised on the trial arose out of discussions concerning the nature of defendant's employment, and questions of damage. Some other points also appeared. In the view which we take of the case, the former becomes more important, and will be first considered. Plaintiff had a large circus property, including horses, wild animals, and various paraphernalia, with tents and appliances for exhibition. He owned special cars, fitted up for the carriage of performers and property, in which the whole concern was moved from place to place for exhibition.

The defendant company has an organized connection, under the same name, with railways running between Detroit and St. Louis, through Indiana and Illinois. On the 25th of July, 1882, a written contract was made at St. Louis by defendant's proper agent, with plaintiff, to the following effect: Defendant was to furnish men and motive power to transport the circus by train of one or more divisions, consisting of twelve flat, six stock, one elephant, one baggage and three passenger coaches, being in all twenty-three cars, from Cairo to Detroit, with privilege of stopping for exhibition at three places named, fixing the time of starting from each place of exhibition, leaving Cairo August 19th; Delphi, August 21st; Columbia City, August 22d; exhibiting at Detroit, August 23d; and then to be carried over to the Great Western Transfer Line boats. Plaintiff was to furnish his own cars, and two from another company at Cairo, in good condition and running order. It was agreed that "for the use of the said machinery, motive power and men, and the above enumerated privileges, plaintiff should pay \$400 for the run to Delphi, \$175 to Colombia City, and \$225 to Detroit, each sum to be paid before leaving each point of departure." It was further expressly stipulated that the agreement was not made with defendant as a carrier, but merely "as a hirer of said machinery, motive power and right of way, and the men to move and work the same; the same to be operated under the management, direction, orders and control of said party of the second part (plaintiff) or his agent, as in his possession, and by means of said employes as his agents, but to run according to the rules, regulations and time-tables of the said party of the first part." The contract further provided that defendant should not be responsible for damage by want of care in the running of the cars, or otherwise, and for stipulated damages in case of any liability. It also provided for transporting free on its passenger trains two advertising cars and advertising material.

The plaintiff's cars were made up in two trains at Cairo, and divided to suit instructions. The testimony tended to prove that two cars were added to the forward train by order of plaintiff's agent, but in the view we take, the question who did it is not im-

portant. The forward train was for some cause, on which there was room for argument, brought to a stand-still and run into by the other train, and considerable damage done by the collision. Defendant insisted that plaintiff made out no case for recovery, and that the contract exempted it. Plaintiff claimed, and the court below held, the exemption incompetent. Unless this undertaking was one entered into by the defendant as a common carrier, there is very little room for controversy. The price was shown to be only ten per cent. of the rates charged for carriage, and the whole arrangement was peculiar. If it was not a contract of common carriage, we need not consider how far in that character contracts of exemption from liability may extend. In our view it was in no sense a common carrier's contract if it involved any principle of the law of carriers at all. The business of common carriage, while it prevents any right to refuse the carriage of property such as is generally carried, implies, especially on railroads, that the business will be done on trains made up by the carrier and running on their own time. It is never the duty of a carrier, as such, to make up special trains on demand, or to drive such trains made up entirely by other persons or by their cars.

It is not important now to consider how far, except as to owners of goods in the cars forwarded, the reception of cars, loaded or unloaded, involves the responsibility of carriers, as to the owners of the cars, as such. The duty to receive cars of other persons, when existing, is usually fixed by the railroad laws, and not by the common law. But it is not incumbent on companies, in their duty as common carriers, to move such cars except in their own routine. They are not obliged to accept and run them at all times and seasons, and not in the ordinary course of business. The contract before us involves very few things ordinarily undertaken by carriers. The trains were to be made up entirely of cars which belonged to plaintiff, and which the defendant neither loaded nor prepared, and into the arrangement of which, and the stowing and placing of their contents, defendant had no power to meddle. The cars contained horses which were entirely under control of plaintiff, and which, under any circumstances, may involve special risks. They contained an elephant, which might very easily involve difficulty, especially in case of accident. They contained wild animals, which defendant's men could not handle, and which might also become troublesome and dangerous. It has always been held that it is not incumbent on carriers to assume the burden and risks of such carriage. The trains were not to be run at the option of the defendant, but had short routes and special stoppages, and were to be run on some part of the road chiefly during the night. They were to wait over for exhibitions, and the times were fixed with reference to these exhibitions, and not to suit the defendant's convenience. There was also a divided authority, so that while defend-

ant's men were to attend to the moving of the trains, they had nothing to do with loading and unloading cars, and had no right of access or regulation in the cars themselves.

It cannot be claimed on any legal principle that plaintiff could, as a matter of right, call upon defendant to move his trains under such circumstances and on such conditions, and if he could not, then he could only do so on such terms as defendant saw fit to accept. It was perfectly legal and proper, for the greatly reduced price, and with the risks and trouble arising out of moving peculiar cars and peculiar contents on special excursions and stoppages, to stipulate for exemption from responsibility for consequences which might follow from carelessness of their servants while in this special employment. How far, in the absence of contract, they would be liable in such a mixed employment, where plaintiff's men, as well as their own, had duties to perform connected with the movement and arrangement of the business, we need not consider. It is a misnomer to speak of such an arrangement as an agreement for carriage at all. It is substantially similar to the business of towing vessels, which had never been treated as carriage. It is, although on a larger scale, analogous to the business of furnishing horses and drivers to private carriages. Whatever may be the liability to third persons who are injured by carriages or trains, the carriage owner cannot hold the persons he employs to draw his vehicles as carriers. We had before us a case somewhat resembling this in more or less of its features in *Mann v. White River Log & Booming Co.*, 46 Mich. 38, where it was sought to make a carrier's liability attach to log-driving, which we held was not permissible. All of these special undertakings have peculiar features of their own, but they cannot be brought within the range of common carriage. It is therefore needless to discuss the other questions in the case, which involve several rulings open to criticism. We think the defendant was not liable in the action, and it should have been taken from the jury, and a verdict ordered of no cause of action. The judgment must be reversed, and a new trial granted.

The other justices concurred.

ATOHISON & N. R. Co.

v.

MILLER.

(16 *Nebraska Reports*, 661.)

The statute of limitations, as a defence to an action, must be pleaded, or it will be considered as waived by the defendant.

18 A. & E. R. Cas.—85.

A rule or custom adopted by a railroad company concerning its contracts with its patrons for the transportation of grain, cannot operate upon those of its patrons who have no knowledge of the existence of such rule, and such persons will not be legally bound thereby.

When a carrier offers to carry the goods of a shipper for a certain price per car-load, and the shipper accepts such offer and ships the goods thereunder, the carrier is bound thereby, and cannot be heard to say he will not abide by its terms; and if a greater sum is retained by the carrier upon sale of the goods, it will be required to respond to the shipper for such excess.

If, in an action upon a contract, fair and legal upon its face, it is claimed by the defendant that the contract is void as being illegal and against public policy, such illegality must be pleaded, or it will be disregarded by the court in which such action is pending.

ERROR from Richardson county.

Marquette & Dewese, for plaintiff.

Frank Martin, for defendant.

REESE, J.—The allegations of the petition of the defendant in error, filed in the district court, were, in substance, that the defendant (plaintiff in error) was a common carrier, and engaged in carrying freights, etc., from Falls City, Nebraska, to Atchison, Kansas, and various other points; that the plaintiff (defendant in error), with one George L. Moore, was engaged in the business of buying and selling grain at Falls City, and shipping the same over the road and in the cars of plaintiff in error during the years 1877 and 1878, and that on the 15th day of March, 1877, the plaintiff and defendant entered into a contract by which it was agreed that the plaintiff in error was to carry the corn of the defendant in error in car-load lots from Falls City, Nebraska, to Atchison, Kansas, at the rate of twenty-two dollars per car-load of 24,000 pounds or less; that, in pursuance of this contract, Miller & Moore shipped over the road of plaintiff in error to Atchison 175 car-loads of corn, and that plaintiff in error collected and retained out of the proceeds of the corn so shipped the sum of twenty-five dollars per car-load, and agreed to pay the said Miller & Moore the difference between the amount agreed upon and the amount so retained, but had failed so to do upon demand; that the firm of Miller & Moore was dissolved in the year 1878, and this claim transferred to Miller, the plaintiff below. To this petition a general demurrer was filed by plaintiff in error, which was overruled by the district court, whereupon plaintiff in error answered, admitting the corporate existence of defendant, but denying all other allegations of the petition. A trial was had, which resulted in a verdict and judgment in favor of the plaintiff below. The plaintiff in error now brings the cause into this court by proceedings in error.

The proof taken upon the trial shows that on the 18th day of March, 1877, the general freight agent of the plaintiff in error wrote and sent by mail to the firm of Miller & Moore the following letter:

“ATCHISON, KANSAS, March 18, 1877.

“*Miller & Moore, Falls City, Neb.*—GENTS: I have instructed our agent to charge twenty-two dollars for 24,000 or less of corn on all of your business, Falls City to Atchison.

“Yours truly,

“J. E. UTT.”

Miller & Moore then began shipping corn under this agreement, the freight bills being made out accordingly. Shortly afterwards, the defendant in error was in the office of plaintiff in error at Falls City, and in looking over the books of plaintiff in error he discovered that a higher rate was being charged for the transportation, this higher rate being the tariff rate of the railroad company. He inquired of the agent the cause of this, and was informed by him that the bills had been returned to him corrected so as to conform to the higher rate, and that he had “telegraphed down and wanted to know how it was his bills were sent back corrected at regular rates,” and that Utt had informed him (the agent) “it was all right, and Miller & Moore could draw the difference in rebate—in the form of rebate.” Miller & Moore continued to ship corn until about 120 car-loads were shipped, when the firm of Miller & Moore was dissolved. Upon demand by Miller for the amount due him from plaintiff in error, payment was refused, whereupon he commenced this suit for its recovery.

The first question presented by plaintiff in error in its brief is that a part of the shipments were made more than four years prior to the commencement of the action, and that the claim, to that extent, if any ever existed, was barred by the statute of limitations. This question cannot be considered here, for the reason that no issue of this character is raised by the pleadings. “The benefit of the statute, like any other personal privilege, may be waived, and will be unless pleaded.” *Taylor v. Courtnay*, 15 Neb. 196; *Maxw. Pl. & Pr.* (1883), 79.

It is claimed by plaintiff in error that the district court erred in refusing to instruct the jury that, under the evidence in the case, the contract, if any existed, would expire at the end of the year in which it was made. The plaintiff in error introduced testimony on the trial tending to show that it was a rule or custom of the company that all contracts like the one involved in this case terminated with the year in which they were entered into. This was shown by other shippers who had like contracts, and by the officers and agents of the company; but no proof was offered which in any degree tended to show that defendant in error or Moore had any knowledge of such custom. But, on the contrary, it was affirmatively shown by him, not only that he had no such knowledge, but that his claim had been recognized by plaintiff in error as a valid claim, and he had been assured by its officers and agents that it would be paid. If such a custom existed, it could not be.

claimed to bind those who had no knowledge of it, nor could it be held to bind any one if waived by the party making the rule. The court did not err in refusing the instruction.

It is next claimed by plaintiff in error that the letter introduced in evidence did not amount to a contract. Standing alone, it is evident it does not, yet, when taken in connection with the other facts in the case, it is equally clear that the letter forms a part of a contract which existed as soon as accepted and performed by defendant in error. Briefly stated, it amounts to this: Plaintiff in error, by its duly authorized agent, says to defendant in error, "You can ship over our road for twenty-two dollars per car, and I have so instructed our agent at your station." The defendant in error enters upon the performance of the offered contract, and so notifies plaintiff in error. When he suggests that the contract is being violated by higher charges, he is informed that "it is all right," and he can draw the difference in the "form of a rebate," and the performance of the contract is continued by both parties. It was, perhaps, terminable at the option of either party, but neither one saw proper to terminate it. It must not be forgotten that the contract was executed by both of the parties to it, and this action was brought for the purpose of recovering that which was due defendant in error by virtue of his fulfillment of it, and that which was wrongfully withheld by plaintiff in error. The cases cited by plaintiff in error were actions for damages for the non-fulfillment of contracts to furnish or transport property; but had these contracts been executed, we apprehend the holding would have been different. The next point presented by plaintiff in error is, that if the theory of defendant in error is true, then the contract was against public policy, and is void. This question is not presented by the issues in the case. It is well settled that the illegality of a contract, if relied upon as a defence, must be pleaded. *Barnett v. Glossop*, 3 Dowl. 625; s. c. 1 Bing. N. C. 633; *Dickson v. Burk*, 6 Ark. 412; *Stannard v. McCarty*, 1 Morris (Iowa), 124; *Huston v. Williams*, 3 Blackf. 170; *Suit v. Woodhall*, 116 Mass. 547; *Cummins v. Barkalow*, 4 Keys (N. Y.), 514; s. c. 1 Abb. App. Dec. 479; *U. S. v. Sawyer*, 1 Gall. C. C. 87; *Chambers v. Games*, 2 Greene (Iowa), 320; 1 Chit. Pl. 276; 2 Chit. Pl. 503, 507.

The judgment of the district court is affirmed.

BARTLETT

v.

PITTSBURGH, CINCINNATI & ST. LOUIS RAILWAY CO.

(94 *Indiana Reports*, 281.)

Where it appears by the record that a pleading was found to be untrue, the Supreme Court will not consider whether there was error in overruling a demurrer to it.

Where a complaint against a common carrier of goods, for failure to deliver goods promptly, counts upon a mere common law liability, and the evidence shows that the goods were received under a special written contract, the variance is fatal, and in such case the overruling of a demurrer to an answer is a harmless error.

The common law liability of a common carrier may be limited by special contract, except such as results from the carrier's negligence.

Suit by a shipper against a railroad company, on a special contract for the shipment of live hogs, whereby the shipper in terms assumed the risk of delay in transportation. It was alleged in the complaint that, before entering into the contract, riots existed, hindering the movement of freight, of the extent of which the shipper, being ignorant, applied to the agent of the defendant at L. to learn if the defendant would ship live hogs thence to East Liberty, notwithstanding the riots; that the defendant, knowing the extent of the riots, by its agent, handed to the plaintiff a copy of a general order of the defendant authorizing its agents to receive and forward such property, whereupon the special contract was entered into and the hogs shipped for East Liberty under it; that upon reaching Columbus, Ohio, they were stopped by reason of riots, and delayed ten days, unloaded, kept in unhealthy pens, whereby they died, lost weight, etc. Another paragraph differed only in averring that the defendant's employes abandoned the train, and were engaged in the riot, in consequence of a reduction of their wages. Another was also similar, save that it was silent as to the general order to receive and ship such property and as to the riots, averring a failure to deliver the hogs at East Liberty within a reasonable time; that there was ten days' delay at Columbus, whereby, etc. Answer: 1. That on arrival at Columbus there was a riot at East Liberty beyond the power of the authorities to suppress, destroying the defendant's railroad, depots and cars, making it impossible safely to take the hogs to East Liberty; that the delay at Columbus was necessary during the riot; that the defendant's servants were not engaged in the riot; that the hogs were properly unloaded and cared for at Columbus; that they died from disease contracted before delivery for shipment; and that there was no riot when they were received for shipment. 2. That by reason of riot, not by defendant's employes, it was unsafe at the time to carry beyond Columbus; that within twenty-four hours after the riot ceased, the hogs were delivered at East Liberty; that at Columbus they were unloaded and cared for by the plaintiff; that those which died were diseased when shipped. 3. Same as the second, with the averment that there was no negligence of the defendant.

Held, that each paragraph of the answer was good, showing that the delay was not caused by any negligence of the defendant.

Unless there be a motion below for judgment on the jury's answers to interrogatories, notwithstanding the general verdict, no question concerning the right to such judgment can arise in the Supreme Court.

The rejection of admissible evidence, which it is clear would not have changed the result, is a harmless error.

FROM the Henry Circuit Court.

M. E. Forkner, for appellant.

J. H. Mellett, E. H. Bundy, W. D. Foulke and J. L. Rupe, for appellee.

HAMMOND, J.—This was an action by the appellant against the appellee to recover damages occasioned by delay in the shipment of hogs from Lewisville, this State, to East Liberty, Pennsylvania. The complaint was in six paragraphs; the answer was in fifteen paragraphs, of which the first and tenth were general denials. There was a reply in denial and also by affirmative paragraphs. A trial by jury resulted in a verdict for the appellee. Judgment was rendered on the verdict over the appellant's motion for a new trial and exceptions. The consideration of alleged errors will be confined to those discussed in the appellant's brief.

The appellant demurred for the want of facts to each of the special paragraphs of answer. The demurrer was sustained to the second, third and fourth paragraphs, and overruled as to the others. Complaint is made as to the overruling of the demurrer to the fifth, eighth, ninth, eleventh, thirteenth and fourteenth paragraphs of the answer. The jury, in answer to interrogatories, found specially that the facts relied upon as a defence in the fifth and eleventh paragraphs of answer were not true. This rendered the overruling of the demurrer to those paragraphs harmless, even if such ruling was erroneous. A party has no ground of complaint to the overruling of his demurrer to a pleading if upon trial it affirmatively appears from the record that the pleading was found not to be true. *State, etc., v. Julian*, 93 Ind. 292.

The first paragraph of the appellant's complaint alleged that, on July 21st, 1877, the appellant delivered to the appellee, a common carrier, 265 head of hogs at Lewisville, to be transported and delivered to the appellant at East Liberty, within a reasonable time; that appellee failed to do this, but carried the hogs to Columbus, Ohio, an intermediate station, and there delayed and kept them in pens in unhealthy places for twelve days, whereby fifty-eight died and the remainder shrank in weight, etc., to the appellant's damage, etc. The ninth paragraph of answer was addressed to the first paragraph of the complaint. The first paragraph of the complaint, as will be observed, was based upon the appellee's liability as a common carrier, and not upon any written contract. But it was shown in evidence, and specially found by the jury, as a fact in their answers to interrogatories, that the shipment of appellant's hogs was made under three written contracts. It is settled by the decisions of this court, that where suit is brought against a common carrier to recover damages for the non-delivery of goods received by it for carriage, and the complaint merely alleges a breach of the common law duty

of such carrier, if the evidence shows that the goods were received for carriage under a special written contract, which was not declared upon, the variance is fatal and the plaintiff cannot recover. *Indianapolis, etc., R. R. Co. v. Remmy*, 13 Ind. 518; *Jeffersonville, etc., R. R. Co. v. Worland*, 50 Ind. 339; *Lake Shore, etc., R. W. Co. v. Bennett*, 89 Ind. 457; *Hall v. Pennsylvania Co.*, 90 Ind. 459; s. c., 16 Am. & Eng. R. R. Cas. 165. As the appellant could not, in any event, under the evidence, have recovered upon the first paragraph of his complaint, the overruling of a demurrer to an answer thereto was an error, if any, which did the appellant no harm.

The eighth paragraph of the answer was addressed to the first, fourth, fifth and sixth paragraphs of the complaint. So far as it was intended as an answer to the first paragraph of the complaint, it is disposed of by what is said above respecting the ninth paragraph of answer. The thirteenth and fourteenth paragraphs of answer were directed to the fourth, fifth and sixth paragraphs of the complaint.

The fourth paragraph of the complaint charges that, prior to the shipment of the hogs, riots existed on the appellee's road, interfering with the movement of freight, and the appellant, being ignorant of their extent, applied to the appellee's agent at Lewisville, on July 21st, 1877, to ascertain if the appellee would ship his hogs from that place to East Liberty, notwithstanding said riots, and that the appellee, knowing the extent of said riots, delivered, by its agent, to the appellant a copy of a general order of the appellee addressed to its agents as follows:

"RICHMOND, IND., July 20th, 1877.

"ALL AGENTS—You can now receive and forward stock and perishable freight for Pan-Handle and East *via* P. R. R.

(Signed) "J. F. MILLER."

It is averred that, upon receiving the above order, the appellant, by his agent, Thomas W. Hall, executed to the appellee the following written agreement:

"The undersigned hereby contracts, agrees and binds himself, and for the owners of the stock shipped in cars Nos. 5171, 4371, 5041, on the P., C. & St. L. R. R., at Lewisville, Indiana, station, on the 21st day of July, 1877, to be transported to East Liberty by the Pittsburgh, Cincinnati & St. Louis Railway Company, in consideration of the said company agreeing to transport the said stock at the special rates and conditions given in local tariff, to load, unload, feed, water and attend to the stock himself; and having examined the cars, to assume all risks of transportation, both as to the stock and the individual who may travel with such stock to attend to it, being all risks arising from any defect in the body of

the cars, imperfect doors and fastenings, overloading, or from vicious and restive animals, delays, and all risk of the escape and robbery of any portion of said stock, or of loss or damage from any other cause or thing not resulting from defective trucks, wheels or axles. And it is hereby acknowledged that 24,000 pounds is the maximum weight allowed by the railroad company to be loaded in any one car. It is agreed that the company shall not be responsible for any delays at terminal points, nor for delays at points where stock is to be delivered to connecting lines, caused by their refusal or inability to receive it, after a tender of delivery has been made by this company. Signed at Lewisville, this 21st day of July, 1877.

“Witness: J. B. GURRIN,
“T. W. HALL”

It is averred that on the faith of the said order the appellant shipped 265 hogs under said contract; that the appellee did not carry the hogs to East Liberty within a reasonable time, but transported them to Columbus, where they were stopped by the riots, unloaded, placed in unhealthy pens, and there kept for twelve days by the appellee, being ten days longer than usual, whereby sixty of the hogs died, and others lost in weight, etc.

The fifth paragraph of the complaint is the same as the fourth, with the additional averments, that at Columbus the appellee's employes abandoned the train and uncoupled the cars; that there was a riot which originated between the Pennsylvania Railroad Company and the appellee on the one side and their employes on the other, and was occasioned by a reduction of wages; that appellee's employes were engaged in the riot; and that by reason thereof there was a delay of twelve days at Columbus.

The sixth paragraph of the complaint is the same as the fourth, except that the allegations as to the riot and the order signed by Miller are omitted; the breach averred being that the appellee did not within a reasonable time transport said hogs to East liberty, but carried them to Columbus, and placed them in unhealthy pens for ten days, etc.

The eighth paragraph of the answer alleges that the appellee, within a reasonable time, carried the hogs to Columbus; “that at the time of the arrival of the train of the defendant containing said hogs at said Columbus, there was a violent, forcible and tumultuous riot prevailing at said city of East Liberty, to such an extent that the same was beyond the power and control of the civil and military authorities;” that the rioters were engaged in the destruction of the appellee's property, including its road-bed, depots and rolling-stock, so that it was unsafe and impossible to deliver the appellant's hogs at said East Liberty; that the rioters were not the agents or servants of the appellee; that by reason of the riot the appellant's hogs were necessarily detained at Colum-

bus during the riot, which continued five days, and also detained seven days thereafter on account of the accumulation of freight; that the hogs were unloaded and put in pens and properly taken care of; that fifty-eight of them died from disease contracted before they were delivered to the appellee and from natural causes, without the fault or negligence of the appellee; and that the riot was not in existence when the hogs were received by the appellee for shipment.

The thirteenth paragraph of the answer alleges the transportation of the hogs to Columbus, an intermediate station, within a reasonable time; that upon their arrival there was a riot at East Liberty and Columbus; that prior to the shipment, as was then known to the appellant, there was a riot, but not such as to prevent the running of the appellee's trains; that by reason of the riot it was unsafe to proceed further than Columbus; that within twenty-four hours after the riot was subdued the hogs were delivered; that the fifty-eight hogs which died at Columbus were sick and diseased when shipped; and that the hogs were unloaded, fed and cared for by the appellant, as it was his duty to do under his contract of shipment.

The fourteenth paragraph of the answer is substantially the same as the thirteenth, except that it avers that the hogs died from disease contracted before shipment, and from natural causes, and not by the appellee's negligence. This paragraph, as well as the thirteenth, averred that the rioters were not employés of the appellee.

The appellant's counsel, in his brief, in reference to the fourth and fifth paragraphs of the complaint, says: "The theory upon which they were drawn, and what I now contend for them, is, that the legal effect of the contract of shipment, and the written order of the company delivered by defendant's agent to plaintiff, construed together in the light of the relative conditions and contract of the parties, was that the defendant assumed the risk of the delay and damage by reason of said riot; and that having caused the plaintiff to ship his hogs by the assurances or said order, the defendant is now estopped from claiming any impunity from damage occasioned by delay in consequence of said riot. The defendant answered by the thirteenth, fourteenth and amended eighth paragraphs of answer. In these pleas it pleads the riots as an excuse and justification for the delay. They are bad, for the reason that under the complaint to which they are pleaded, the appellee assumed the risks of said riots, and is estopped from claiming anything by reason of them, as above stated."

We do not think that the order and contract referred to are susceptible of the construction contended for. The order of Miller to the appellee's agent, a copy of which was delivered to the appellant, simply authorized such agents to receive for shipment livestock and perishable property.

The appellant, according to the fourth and fifth paragraphs of the complaint, knew of the existence but not of the extent of the riots. With this knowledge, he, by his agent, executed the contract whereby he assumed certain risks, among them, delays of transportation. Taking the order and contract together, in the light of the surrounding circumstances, their obvious meaning was that the appellee accepted for shipment the appellant's hogs, he assuming the risks referred to. One of these risks was that of the delays complained of.

We do not think that any reasonable construction of the order and contract would lead to the conclusion that the appellee, in the shipment of the hogs, intended to insure against losses from delays in transportation, occasioned without its fault or negligence. Indeed, the strict liability of common carriers, where they are without fault or negligence, does not seem to extend to losses from delays in transporting live-stock and perishable property, though such delays are not caused by the act of God or the public enemies. *Pittsburgh, etc., Ry. Co. v. Hollowell*, 65 Ind. 188; *Pittsburgh, etc., R. R. Co. v. Hazen*, 84 Ill. 36. But even if such liability existed in the absence of contract, it is settled that a common carrier may, by express contract, relieve itself from its common law liability except as to consequences of its own negligence. *Adams Ex. Co. v. Reagan*, 29 Ind. 21; *Adams Ex. Co. v. Fendrick*, 38 Ind. 150; *St. Louis, etc., Ry. Co. v. Smuck*, 49 Ind. 302.

In the present case, it does not become necessary for us to decide whether the appellee, in the absence of a contract limiting its real or supposed common law liability, would be responsible for the losses complained of by the appellant, if such losses were in no way attributable to its fault or negligence. The appellant shipped his stock under an express contract which relieved the appellee from liability in consequence of delays in transportation, and it is not liable for losses occasioned by such delays, if it was without fault or negligence itself.

The facts specially pleaded in the 8th, 13th and 14th paragraphs of the answer are sufficient to show that the delays and consequent losses occurring in the shipment of the appellant's hogs were not the result of the appellee's fault or want of care. These paragraphs of answer were good, and there was no error in overruling the demurrers thereto.

It is insisted by counsel for the appellant, that, under the facts specially found by the jury in answer to interrogatories, he was entitled to judgment for \$687.50, notwithstanding the general verdict in favor of the appellee. The facts specially found by the jury do not appear to us to be inconsistent with their general verdict; but if the inconsistency contended for existed, and if the appellant, by the proper motion, had been entitled to judgment on the special findings, notwithstanding the general verdict, we could

not, on this ground, reverse the judgment. The question whether a party is entitled to judgment on special findings, in the face of the general verdict, is only presented by motion therefor in the trial court. *Toledo, etc., Ry. Co. v. Craft*, 62 Ind. 395; 1 Works Pr., Sec. 864. No such motion was made in this case.

The order signed by Miller, directing the appellee's agents to receive and forward stock, etc., was offered in evidence by the appellant, but its introduction was not permitted by the court. As a part of the transaction of the shipment of the appellant's hogs, no very good reason occurs to us for its exclusion from evidence. At the same time, however, we are unable to see how the appellant was harmed by the ruling. The order, at most, when delivered to the appellant, was simply a declaration by the appellee of its willingness to receive and forward his stock. That it did receive and forward it is a fact not in dispute. As already adverted to, there was nothing in this order that in any way qualified the contract of shipment.

The evidence tended to show that the hogs were shipped in five cars; that by direction of the appellant's agent, T. W. Hall, three of the cars were consigned to said Hall, one car to J. W. Dennis and one to H. P. Gough. Dennis and Gough, at the time of shipment, each executed to the appellee a contract exactly like that executed by Hall. These contracts were put in evidence by the appellee over the appellant's objection. It is insisted that it does not appear from the evidence that Dennis and Gough were agents of the appellant, with authority to execute these contracts. Their agency, however, we think, was sufficiently shown from the circumstances of the transaction, to warrant the court in admitting in evidence the contracts referred to.

Complaint is made of the submission of certain interrogatories to the jury, and of the refusal of the court to require the jury to make their answers to the interrogatories more specific. It would add unnecessarily to the length of this opinion to examine each question and answer alluded to; and it is sufficient to say, generally, that we are satisfied that no injustice was done in any of the respects named.

It is claimed that the verdict of the jury was not sustained by sufficient evidence. The facts specially found by the jury in answer to interrogatories were substantially as follows:

The appellant, by his agents, executed the three written contracts, introduced in evidence, dated July 21st, 1877, and signed respectively by Hall, Dennis and Gough; that Hall told appellee's agent at Lewisville to consign one load of hogs to Dennis and one to Gough; that the agent did this, and Dennis and Gough signed the two contracts bearing their signatures; that the appellant was not the owner of the hogs referred to in the contract signed by Dennis, but was the agent of the owner thereof; that about thirty

hogs died out of the three car-loads mentioned in the contract signed by Hall, and ten in each car-load consigned to Dennis and Gough; that the hogs were detained at Columbus by reason of the riots at Pittsburgh and along the line of the appellee's road, obstructing the running of trains; that the riots were of such magnitude that it was impossible for the appellee to suppress them or move its trains; that the appellee carried the appellant's hogs as far as Columbus on the road to East Liberty within a reasonable time; that at the time of the arrival at Columbus there was a tumultuous riot at Pittsburgh, engaged in the violent destruction of property, which the civil and military authorities were unable to suppress, and which riot rendered it unsafe to ship the appellant's hogs to East Liberty prior to the time they were actually sent; that the appellant knew by newspaper reports at the time the hogs were shipped that a riot was in progress at Pittsburgh; that Columbus was the most suitable place for the detention of the appellant's hogs; that the hogs were moved to East Liberty as soon as practicable after the riot was over, and the road cleared away; that the delay at Columbus was occasioned by forcible resistance from mobs; that the appellee at all times during the riot had a sufficient number of servants and employés to man and operate its trains, and sufficient rolling-stock to ship the hogs to East Liberty; that appellant's hogs were not diseased when shipped; that considering the circumstances of the riot and consequent obstruction, twelve days was a reasonable time in which to deliver the appellant's hogs; that Hall necessarily expended \$100 in taking care of the hogs and himself at Columbus during the detention; that appellee did no negligent or willful wrong by which damages were caused to the appellant; that fifty hogs were not delivered at East Liberty, weighing 250 pounds each, worth \$5.50 per cwt.; that there was thirty pounds shrinkage in each of the hogs delivered at East Liberty.

The evidence tended to prove the foregoing facts, and also that all the hogs that were shipped from Lewisville arrived at Columbus, and that all that were shipped at Columbus arrived at East Liberty; that the hogs which did not arrive at East Liberty died during the delay of ten days at Columbus; that while so delayed the hogs were cared for, under the direction of Hall, the appellant's agent, by proprietors of stock-yards, who were not engaged, nor in any way employed, by the appellee; and that some of the rioters had previously been in the employment of the appellee, but that such employment ceased when they engaged in the riot. We think that the verdict of the jury was sufficiently sustained by the evidence.

Complaint is made of the instructions of the court to the jury, but the questions of law thus involved have been considered in what has been said relating to the pleadings. We are of the opin-

ion that the trial court, in its charges to the jury, correctly stated the law as applicable to the issues and the evidence.

Judgment affirmed, with costs.

Common Carrier Not Liable for Loss Occasioned by Act of Public Enemy.—A common carrier is, of course, not liable for loss or delay in the transportation of goods occasioned by the public enemy. *Holloday v. Kennards*, 12 Wall. 254; *Hubbard v. Harnden Express Co.*, 10 R. I. 244; *Phila., W. & B. R. Co. v. Harper*, 29 Md. 330; *Lewis & Co. v. Ludwick*, 6 Coldw. (Tenn.) 868; *Bland v. Adams Express Co.*, 1 Duval 282; *Southern Express Co. v. Wonack*, 1 Heisk. (Tenn.) 256; *McCrane v. Wood*, 24 La. Ann. 406; *Nashville, C. & St. L. R. Co. v. Estes*, 8 Am. & Eng. R. R. Cas. 492.

But see *Porcher v. Northeastern R. Co.*, 14 Rich. 181, and *Seligman v. Armingo*, 1 New Mex. 459.

English Authorities as to Losses Caused by Armed Mob.—By the strict doctrines of the common law, a common carrier is not exempt from liability for the loss of goods occasioned by an armed mob. Such mob is not, however overwhelming in force or numbers, a public enemy in the eye of the law. *Coggs v. Bernard*, 2 Sack. 919; *Forward v. Pittard*, 1 Tenn. R. 27; *Barclay et al. v. Cevailla y Gana*, 3 Doug. 389.

Authorities as to Losses and Delays Caused by Riots.—In the United States, however, the existence of a powerful armed mob has been held sufficient to exempt a carrier from liability for failing to furnish transportation facilities according to contract. *Pittsburgh, C. & St. L. R. Co. v. Hollowell*, 65 Ind. 188.

And even to excuse delay in transportation after the live-stock have begun the journey. *Pittsburgh, Ft. W. & C. R. Co. v. Hazen*, 84 Ill. 36; *Lake Shore & Mich. S. R. Co. v. Bennett*, 6 Am. & Eng. R. R. Cas. 891; *Bartlett v. Pittsburgh, C. & St. L. R. Co.*, 94 Ind. 281; s. c., *supra*.

A mere strike on the part of the employes of a railroad company will not excuse delay in the transportation of freight. *Blackstock v. New York & Erie R. Co.*, 20 N. Y. 48; *Read v. St. Louis, K. C. & N. R. Co.*, 60 Mo. 199.

How Far Losses by Riots Within Exception of Bill of Lading Limiting Liability.—As to the question whether a loss or delay caused by an armed mob comes within the clauses of a bill of lading limiting the liability of the company in certain cases, see the following authorities. *Sherman, Hall & Co. v. Penna. R. R. Co.*, 8 Am. & Eng. R. R. Cas. 274; *Wertheimer v. Penna. R. R. Co.*, 17 Blatchf. 421.

ST. LOUIS, IRON MT. & SOUTHERN RAILWAY

v.

HEATH.

(43 Arkansas Reports, 477.)

A railroad company is bound to deliver freight at its destination with reasonable expedition. A delay of seventy days, unexplained, is unreasonable.

“Matters of damage to personal property” in Sec. 40, Art. VII, Arkansas constitution of 1874, means all injuries which one may sustain in respect to his ownership of personal estate.

An action against a railroad company for breach of contract for the carriage and delivery of goods may be in form *ex contractu* or *ex delicto*. But the law applicable and the measure of damages are the same in both classes of action; and in either form a justice of the peace has jurisdiction to hear and determine the cause.

APPEAL from Lawrence Circuit Court.

Dodge and Johnson, for appellant.

W. F. Henderson, for appellee.

SMITH, J.—Heath sued the railway company before a justice of the peace for \$100 damages, alleged to have been sustained by him by reason of the detention of certain goods of his. To his complaint he attached his bill of lading, from which it appeared that the company had received the goods at Cairo, in Illinois, and had undertaken to transfer them to Walnut Ridge, in Arkansas. The plaintiff alleged that the defendant's servants had negligently carried the goods beyond their place of destination, in consequence of which they were not delivered to him for a period of seventy days. The defendant was duly summoned, but did not appear in the justice's court. There was a judgment by default, from which the defendant appealed to the circuit court. There its appeal was dismissed for the want of prosecution, and it has appealed to this court.

The only question is whether the complaint sets forth a cause of action within the jurisdiction of the justice.

The obligations which the law imposes upon a common carrier are not only to deliver at its destination the property received by him, but he must deliver or be ready to deliver with reasonable expedition. Cooley on Torts, 640; Addison on Torts, 3d Ed., 464.

A delay of seventy days is unreasonable unless explained, and renders the carrier liable to an action for damages in some court.

By the present constitution (Art. VII, Sec. 40), justices of the peace have exclusive jurisdiction in all matters of contract, and concurrent jurisdiction in all matters of damage to personal property, when the amount in controversy does not exceed \$100. By "matters of damage to personal property" we understand all injuries which one may sustain in respect to his ownership of personal estate.

In suing a common carrier for the breach of a contract for the carriage and delivery of goods, the action may be, in form, either *ex contractu* or *ex delicto*. The plaintiff may bring *assumpsit*, counting upon the non-performance of the agreement which the defendant made with him; or he may bring case and count upon the violation of the public duty which the defendant owes. But the same law is applicable to both classes of action, and the measure of damages is the same in both. *B. & O. R. R. Co. v. Pumphrey*, 59 Md. 390; s. c. 9 Am. & Eng. R. R. Cas. 381.

It is wholly immaterial whether this be regarded as an action upon a contract, or an action for a tort. In either case the justice had jurisdiction to hear and determine the cause. But if it were

material, we should not reverse the judgment in the present state of the record, if, by any proof that might have been adduced on a trial, it was possible for the plaintiff to show that he was entitled to recover. *Dicus v. Bright*, 23 Ark. 110; *Moreland v. Condry*, 40 *id.* 78.

Affirmed.

BUSH *et al.*

v.

NORTHERN PACIFIC R. Co.

(*Advance Case, Dakota, February 16, 1885.*)

In an action against a railroad company for the loss of certain corn and oats entrusted to it for transportation, upon examination of the evidence in this case, *held*, that the instruction of the court did not assume facts as proven that should have been passed upon by the jury, and was not erroneous.

The particular error upon which the motion for a new trial or a reversal of the judgment is relied upon, should be pointed out. Assignments of error *held* not properly presented to the court on the motion for a new trial.

APPEAL from Stutsman county.

White & Hewitt, for appellants.

Johnson Nickens, for respondents.

HUDSON, J.—This action was brought by the plaintiffs and respondents against the defendant and appellant to recover of the defendant, as a common carrier, damages sustained upon a contract for the transportation of goods. The plaintiff alleges, among other things, that on the 26th day of April, A. D. 1882, the defendant, in consideration of \$40.90, agreed to carry from Minneapolis, in the State of Minnesota, to Jamestown, in the territory of Dakota, and there to deliver to the plaintiffs, certain goods, consisting of about twenty-eight bushels of corn, of the value of \$24.97, and 388 bushels of oats, of the value of \$258.97, the property of the plaintiffs, which was delivered to the defendant, who received the same upon the agreement for the purpose above mentioned; that the defendant did not safely carry and deliver said goods mentioned in pursuance of said agreement, but on the contrary the defendant so negligently conducted its business as a common carrier, that the corn and oats were wholly lost, to the damage of the plaintiffs of \$387, for which they demanded judgment. The defendant answered by a general denial of the plaintiffs' claim. On the trial before the jury the plaintiffs, to support their case, called six witnesses, who were duly sworn and testified. The defendant introduced no proof. The case was sub-

mitted to the jury, under the charge of the court, who, after deliberation, found a verdict for the plaintiff in the sum of \$310.83. A motion by defendant for a new trial was overruled by the court, and judgment was entered upon the verdict, from which the defendant appealed. The case is presented to this court upon the brief of the appellant, no oral argument having been made, and no brief was filed by the respondent.

The appellant assigns seven grounds of error as occurring at the trial, upon which a reversal of the judgment is demanded.

The first four of these grounds of error relate to the charge of the court to the jury, and may all be considered together. That portion of the charge of the court to which exception is taken is as follows: "The only question for you to consider is, what amount there was short when the grain reached here (Jamestown). The amount of shortage is really the dispute in this case, and to determine that question, of course, you must take into consideration all the facts connected with the case. The cars, it seems, were thrown from the track, and the company got the grain out and transferred it to other cars as soon as they could, and sent it on to Jamestown. You have heard from the witnesses when it arrived there. After being notified that the cars were here, they went and measured it, and found, as they say, a shortage. The plaintiffs' witnesses have come upon the stand, and they tell you the amount of shortage that they found, and how they found it, on the corn and on the oats. Counsel for the defendant has called out on cross-examination some testimony with regard to what took place at the time the grain was taken from the wrecked cars and put on other cars, and some testimony showing that there was but little loss or but little waste at the time. The amount of waste on the corn, it is claimed by the counsel, was not to exceed some ten bushels in the transshipment. The waste on the oats does not appear. The wet oats were left in the car, the dry oats were put in another car and forwarded, and these plaintiffs, as it is said, took the grain from the cars and measured the amount, and kept an account of it, and you have heard their statement here. It is for you to determine the shortage for which the company is liable. It is a fair dispute or misunderstanding about this claim, and the defendant never has paid it, because it never became satisfied how much it ought to pay. You are here now to say how much they ought to pay, and you must go to your room, consider this matter carefully and honestly, and with the intention of doing justice between the parties, as near as you can."

It is contended by the counsel for defendant that the court assumed in the charge certain facts as proven that should have been passed upon by the jury, namely, that there had been a loss. But no witness, it appears from the record, has said there was no loss. Four of these witnesses were the employés of the company

at the time the accident occurred, and assisted in taking out the grain and transferring it to other cars. Mr. Daly, the freight and express agent of the defendant company, says there was a wreck below Sanborn, and he went down to look after the freight there. These two car-loads of grain were in the wreck; the oats in the water; the corn was dry; the car lying on its side. "I could not see that a bushel of corn was wasted; there might have been a bushel." This is the nearest any witness has come to disputing the loss. Mr. Daly says he sold the wet oats, and remitted the funds to the freight agent of the company. He further says that he told Bush to make out his bill and send it in to the company; "they will, undoubtedly, adjust it." Defendant's counsel concedes that the train containing the cars in question was brought west from Fargo, April 21st, reached Sanborn April 22d, and was there wrecked. He also admitted on the trial that the bill of the grain shipped was correct, and the amount stated for freight paid was also correct. The charge of the court should be based upon the evidence in this case. And in this case there was no testimony except what was given by the plaintiff's witnesses, and they all concurred in the statement that the cars containing the grain were thrown from the track into the water, and that both corn and oats were lost; but they disagree as to the extent of the loss; some of them said there was but little.

It is difficult to see how there was any question of fact to be submitted to the jury, except as to the extent of the loss. No other point was questioned on the trial. How could the court have told the jury to weigh the evidence, and determine the question whether there was any loss, when there was not a *scintilla* of evidence tending to deny the fact which was testified to by all the witnesses? There was no conflict in the testimony on the question of loss. There was no evidence to be weighed, and no preponderance to be found. The counsel for the defendant seems to have taken great pains to produce authority showing the duty of the court in charging the jury, all of which is good law when there are facts to which it may be applied. There was no conflict, except as to the amount of the loss. All of the witnesses testify to some loss on the grain. In this case, if the damages had been liquidated and made certain, the court might, and it would have been its duty to, have directed a verdict for the sum thus made certain; but as the only question on which there was any disagreement of witnesses was the extent of the loss, that question was properly submitted to the jury.

The fifth assignment is as follows: The jury erred in its verdict.

Sixth. The court erred in its judgment, based upon said verdict.

Seventh. The court erred in overruling the motion of the defendant for a new trial.

Neither of these assignments of error can be considered, for the reason that, they were not properly presented to the court on the motion for a new trial. There was no compliance with the statute or the rules, as will be seen by reference to the decision of this court in the case of *Caulfield v. Bogle*, 2 Dak. 464. The particular error upon which the motion for a new trial or a reversal of the judgment is relied upon should be pointed out.

Finding no error in the record, the judgment of the district court is affirmed.

HOT SPRINGS RAILROAD

v.

TRIPPE & Co.

(42 *Arkansas Reports*, 465.)

An association among railroad companies for the transportation of through freights, and a division of the receipts in prescribed proportion, does not constitute a partnership, nor render the carriers jointly liable for loss or injury occurring to goods transported.

APPEAL from Garland Circuit Court.

John M. Moore, for appellant.

R. G. Davies, for appellees.

SMITH, J.—The railroad company was sued as a common carrier for damage done to a lot of dry goods *in transit* from New York to Hot Springs. The Baltimore and Ohio Railroad Company had signed a “through” bill of lading between the two points, guaranteeing a certain rate of freight per hundred weight for the entire distance. There was no stipulation for exemption from liability for losses beyond its own route, but the Baltimore and Ohio road expressly reserved the right to forward the goods by any railroad line between the points of shipment and destination. The goods were sent to St. Louis, and were there delivered to the St. Louis, Iron Mountain and Southern Company, which carried them to Malvern, and turned them over to the defendant to be transported to Hot Springs. When the packages were opened by the consignees, it was discovered that the goods had been injured by wetting.

The jury returned a general verdict for the plaintiffs, but, in response to interrogatories propounded to them, accompanied it with the following special findings:

“1. Do you find from the evidence that the Hot Springs Railroad Company was jointly associated with the other carriers in the carriage of said goods?”

Answer: “We do.”

“ 2. Do you find that the goods were injured while they were in the possession of the defendant; or do you believe they were injured before they were delivered to the defendant?”

Answer: “ We do believe said goods were injured *before reaching Malvern, Arkansas.*”

The jury thus substantially found that the injury did not occur on the defendant's road. And as that finding is abundantly supported by the evidence, we are not at liberty to uphold the judgment rendered upon the general verdict upon the theory that the jury might have presumed that the goods remained uninjured until they came to the hands of the last carrier, and that the loss occurred through its fault. Such a presumption could be indulged only in the absence of all evidence to the contrary. *Laughlin v. C. & N. Y. Ry. Co.*, 28 Wis. 204; *Smith v. N. Y. C. R. Co.*, 43 Barb. 225.

The liability of the defendant, if it is liable at all, must, therefore, depend upon the relation it sustained to the other carriers in regard to the transportation of the goods.

All the evidence upon that point was the bill of lading, to which the defendant was not a party, and which did not mention even its name, specifications of the rate of charges on first-class freight from New York to Hot Springs indorsed on the bill of lading, and the testimony of defendant's superintendent as follows:

“ The charge of each railroad company was separate and distinct from the charge of the other companies. The way-bill contains, in one column, the charges that were paid by the St. Louis, Iron Mountain and Southern Railway Company, which is the freight on the goods from New York to St. Louis; in another column it contains the freight charged by the St. Louis, Iron Mountain and Southern Railway Company from St. Louis to Malvern, and in another and separate column, the freights to be charged by defendant for carrying the goods from Malvern to Hot Springs. The defendant collected all the freight due on the goods from New York to Hot Springs, and paid to the St. Louis, Iron Mountain and Southern Railway Company the freight due it, and the charges it had paid for freight due to St. Louis, and reserved for itself the freight for carrying the goods from Malvern to Hot Springs. The defendant had informed the St. Louis, Iron Mountain and Southern Railway Company of its rate for freight upon its line, and the St. Louis, Iron Mountain and Southern Railway Company made out the freight from Malvern to Hot Springs from the rate as furnished it. Neither company had any connection with or interest in the freights due to the other. They did not divide the earnings over their respective lines or share the expense, but the charges of each company were distinct and independent, both as to the earnings and expense on its line.”

The court gave the following instruction at the instance of the plaintiff, and against the objection of the defendant: "The court instructs the jury that when several distinct corporations associate together and form a continuous line of common carriers, each being empowered to contract for freight for the whole line and to receive pay for the same, which is to be divided in prescribed proportions, all such carriers, so associated, are jointly liable for losses or injuries upon any part of the line; and if they believe that the Hot Springs Railroad was so associated with other common carriers, either from St. Louis, Missouri, or New York, that it is liable for the said losses or injuries whether upon its line or that of any carrier with whom said Hot Springs Railroad is associated."

The defendant asked the following instruction, but the court refused it:

1. "If the jury believe from the weight of the evidence that the plaintiff's goods were injured before they came into the possession of the defendant, they will find for the defendant * * * unless they further find that the defendant and the other railroad companies engaged in the transportation of said goods are jointly liable to plaintiffs for such injury; and in order to render said companies jointly liable, the jury must find from the evidence that they were jointly interested."

In *Darling v. B. & W. R. Co.*, 93 Mass. 295, a similar question came before the Supreme Judicial Court of Massachusetts. It was there said: "Payment of freight in advance is generally inconvenient; and as the goods are generally presumed to be of sufficient value to pay the freight, an arrangement is sometimes made by which each carrier, subsequent to the first, pays what is due when the goods are delivered to him, and the last carrier collects the whole bill from the consignee. Such an arrangement creates no partnership or joint liability. If a further arrangement is made between the carriers that the freight bills shall not be paid on the receipt of each parcel of goods, but an account shall be kept on each line on a particular route, and periodically settled, this will not create a partnership or joint liability, for each line charges separately for its own freight. If it is further arranged that each line shall charge only a stipulated rate of freight, so that any customer can be informed beforehand what the amount of freight will be to a given place of destination, this does not create a partnership or joint liability."

"Arrangements of this character are convenient to the public because they enable carriers to transport goods at low rates. They are inconvenient in some respects. They render it difficult to obtain compensation for injuries to goods, because it is difficult for the owner to prove where the injury was done, and, if he can prove it, he may be obliged to carry on a litigation in a distant State. But if the law is adhered to and contracts are enforced

according to their legal interpretation, business will regulate itself, and methods will be discovered to avoid inconveniences."

See also *Converse v. N. & N. Y. Transportation Co.*, 33 Conn. 166, upon the point that an association among carriers for the transportation of freights and a division of the receipts in prescribed proportions, does not constitute a partnership, nor render the carriers jointly liable.

The general verdict and the first special finding of facts are unsupported by testimony. And the instruction for the plaintiff copied above was inapplicable to the state of facts in proof. The court likewise erred in refusing the defendant's prayer for the above mentioned direction.

The remedy of the plaintiff was either against the company upon whose line the damage occurred, or against the company which signed the bill of lading.

Reversed for a new trial.

Connecting Railroad Lines as Partners.—An agreement among several railroad companies constituting a through freight line to divide receipts among them according to some fixed plan does not constitute them partners in any sense. *Watkins v. Terre Haute, etc., R. R. Co.*, 8 Mo. App. 570; *Hill v. Burlington, etc., R. Co.*, 9 Am. & Eng. R. R. Cas. 21; *Insurance Co v. Railroad Co.*, 104 U. S. 146; s. c. 3 Am. & Eng. R. R. Cas. 260; *Deming v. Norfolk & Western R. Co.*, 16 Am. & Eng. R. R. Cas. 282; *Converse v. N. & N. Y. Trans. Co.*, 33 Conn. 166.

Railroad companies cannot enter into partnership unless authorized by their charters so to do. *Burke v. Concord R. R. Corp.*, 8 Am. & Eng. R. R. Cas. 552; *State, ex rel. v. Concord R. Corp. et al.*, 18 Am. & Eng. R. R. Cas. 94.

See *Silver v. St. Louis, etc., R. R. Co.*, 72 Mo. 193, in which a contract between connecting lines as to certain freight, which contract was alleged to amount to a partnership, was discussed and commented upon.

PEREIRA

v.

CENTRAL PACIFIC RAILROAD COMPANY.

(*Advance Case, California, November 7, 1884.*)

A railroad company that contracts to carry goods over its own and connecting roads, and deliver the same within a certain time at a destination beyond the terminus of its own line, is liable to the shipper for damages caused by delay in transportation over such connecting roads. Whether the contract of shipment provided for a carriage beyond such terminus is a question for the jury. Upon the determination of this question the provisions of the receipt delivered by the carrier to the shipper are not conclusive upon the latter.

APPEAL from a judgment of the Superior Court for San Joaquin county entered in favor of the plaintiff, and from an order denying the defendant a new trial. The opinion states the facts.

W. L. Dudley, for the appellant.

Caleb Dorsey and *D. S. Terry*, for the respondent.

Ross, J.—The main question in this case is, whether the defendant, whose road ends at Ogden, in the territory of Utah, contracted with the plaintiff to carry his fruit beyond its own terminus over other roads to the city of New York. That question was submitted to a jury in the court below, and the finding in effect was, that defendant did so contract.

It appeared in evidence that the plaintiff, being desirous of sending to the New York market a lot of pears, applied to the general freight agent of the defendant corporation to know what defendant would charge him per car-load, to be sent by passenger train, plaintiff at the time informing the agent that it was necessary that the fruit should be transported to its destination within ten or twelve days. The agent replied that he did not then know what it would cost, but thought about \$1,500 per car-load, and further, that he could not send it through to New York by passenger train, but could send it by passenger train as far as Omaha, and from there to New York by fast freight train, and that thus sent it would reach New York within the time mentioned. The agent promised to let plaintiff know within a few days as to the terms upon which defendant would take the fruit, and accordingly wrote and sent to the plaintiff this letter :

“CENTRAL PACIFIC RAILROAD COMPANY, }
GENERAL FREIGHT OFFICE, }
SACRAMENTO, CAL., NOV. 14, 1871. }

“JOHN PEREIRA, ESQ., JAMESTOWN, TUOLUMNE CO., CAL.—*Dear Sir*: I am in receipt of your favor of November 10th, and have this day telegraphed you as follows: Fruit Stockton to New York, to Omaha by passenger train, thence by freight ten hundred and seventy-five (\$1,075), C. Y., per car. Freight must be prepaid, or else guaranteed by responsible parties. The current rates on wine Stockton to New York are as follows: Wine in wood, owner's risk of leakage, car-loads of eighteen thousand pounds and over, two dollars and fifty cents per one hundred pounds—less than eighteen thousand pounds, and over three thousand, three dollars and fifty cents per one hundred pounds—three thousand pounds and under, four dollars and fifty cents per one hundred pounds. It is not probable that there will be any material change in these rates before next spring. Yours truly, C. W. SMITH, G. F. A.”

Plaintiff accepted the terms thus proposed, and accordingly delivered to the defendant on the 23d of November, 1871, one car-load consisting of 536 boxes of pears, consigned to L. Benedict, New York city, and at the same time executed to defendant the guarantee it required that the freight money, \$1,075, would be paid to

defendant on the delivery of the fruit in New York. Such delay occurred in the transportation of this lot of fruit to its destination, that the result was, it was damaged to such an extent as rendered it almost worthless, and the consignee therefore refused to receive it.

The next lot, consisting of 235 boxes of pears, was delivered to defendant upon the same terms, and with a similar guarantee, on the 8th day of December, 1871, and was never transported to New York at all, and resulted in a total loss to the plaintiff.

The evidence put before the jury in this case in support of the special contract relied on by the plaintiff is quite as strong if not stronger than the evidence given in *Railroad Company v. Pratt*, 22 Wall. 131, to establish a similar contract; and in that case the Supreme Court of the United States held the evidence sufficient to sustain the verdict of the jury, to the effect that the undertaking of the company was to carry the property through to the point of final destination. In the case at bar, it was understood by both parties that it was necessary that the fruit should be carried through to New York within twelve days at the furthest, and that to accomplish this it was necessary that it should be sent a portion of the way at least by passenger train. Defendant accordingly expressly agreed to carry it by passenger train as far as Omaha—a point beyond the terminus of its own road—and thence by fast freight train to New York—demanding at the same time, as it had the right to do, a guarantee from the plaintiff that the freight money should be paid to *defendant* upon the delivery of the fruit in the city of New York.

When the first lot of fruit was delivered by plaintiff's teamster to the local agent of the defendant, the latter gave the teamster a receipt for the same, which was partly in print and partly in writing, acknowledging the receipt in apparent good order of the property, marked and consigned to L. Benedict, New York, and which receipt recites that "they (the railroad company) agree to deliver with as reasonable dispatch as their general business will permit, subject to the conditions mentioned below, in like good order (the danger incident to railroad transportation, loss or damage of combustible articles by fire when in transit, and unavoidable accidents excepted), at ——— station, upon the payment of charges. The company further agree to forward the property to the place of destination as per margin, but are not to be held liable on account thereof after the same shall be delivered as above. The company, however, guarantee the through rate of freight as designated below: Conditions: The company do not agree to carry the property by any particular train, nor in time for any particular market. * * * It is a part of this agreement that all other carriers transporting the property herein receipted for, as a part of the through line, shall be entitled to the benefit of all the exemptions and conditions above mentioned."

It seems that a similar receipt was given by the local agent of defendant to plaintiff's teamster for the second lot of fruit.

It is contended on behalf of defendant, and was so set up in its answer filed in the cause, that the terms and conditions, stated in the receipt, constituted the contract between the parties of this action for the transportation of the fruit in question. Whether or not this was so, was a question for the jury to determine in view of all the evidence. The simple delivery of a receipt to the shipper is not conclusive upon the latter. *Tyler v. W. U. T. Co.*, 60 Ill. 431; *Mich. Cent. R. R. Co. v. Hale*, 6 Mich. 244; *Adams Express Co. v. Haynes*, 42 Ill. 89; *Ill. C. R. R. Co. v. Frankenberg*, 54 *id.* 88. The court below properly left it the jury to say whether the shipments in question were made under the contract declared on by the plaintiff, or whether the terms and conditions stated in the receipts constituted the contract between the parties. The jury having found from evidence, which we think sufficient to support the verdict, that defendant undertook to carry the fruit through to New York, the other companies are to be deemed the agents of the defendant, for whose fault it is responsible. *Railroad Company v. Pratt*, *supra*.

Some minor points are made for the defendant, which we have considered, but see in them no sufficient ground for disturbing the judgment.

Judgment and order affirmed.

McKinstry, J. and McKee, J., concurred.

Parol Evidence as Altering Terms of Bill of Lading or Supplementary Thereto.—Upon this subject see *Hewitt v. Chicago, B. & Q. R. Co.* and note, *infra*.

HEWITT

v.

CHICAGO, B. & Q. R. Co.

(*Advance Case, Iowa, June 5, 1884.*)

Where a railroad company takes property for shipment to a point beyond its own line, it is bound to deliver it in a reasonable time at its own terminus to another carrier to be forwarded, but is not liable for injuries which might be caused by the negligence of such other carrier after the property was delivered to it.

Parol evidence, tending to show that the undertaking of the defendant railroad company was to deliver the goods at their final destination instead of at the terminus of its own line, as stated in the bill of lading, was incompetent, and its admission was prejudicial as well as erroneous.

A car of potatoes was delivered to the defendant on November 10th, to be shipped to Omaha. The car arrived at Council Bluffs, the defendant's terminus, November 11th, and was put in the yard of the connecting line to be forwarded. That line refused to receive the car, as it was out of repair.

Defendant retook the car, repaired it, and redelivered it on the afternoon of the 13th, and it arrived in Omaha on the 15th. The weather was warm on the 10th, but before the 13th it turned cold, and the potatoes were frozen. *Held*, that the danger from cold was one which ordinary foresight could have apprehended and guarded against; that great diligence and dispatch were required of the company in the duty of forwarding these perishable articles, and that if they were exposed to the danger which injured them through the company's negligence, it is responsible for the damage.

Where the evidence shows that the car was delivered on the 13th, but the receipt therefor was delivered on the 14th, it was error to exclude evidence that between the companies it was the custom that receipts for cars received by one from the other in the afternoon or evening are not delivered till the following day.

Evidence of information received from a clerk or agent as to the date of arrival of a car is not admissible against the defendant, where it is not pretended that the person making the statements to the plaintiff had any authority to bind the defendant by the statements—they were hearsay.

APPEAL from Montgomery District Court.

Plaintiff sues for the value of a car-load of potatoes delivered by him to defendant for shipment, and which were destroyed by being frozen through defendant's negligence, as he alleges, in failing to forward them promptly to their destination. The case was tried to a referee, who found that defendant was liable. Defendant moved to set aside the referee's report, on the grounds that the findings of fact and conclusions of law were not supported by the evidence, and of alleged errors committed on the trial in the admission and exclusion of testimony. The district court overruled the motion, and entered judgment for plaintiff on the report. Defendant appeals.

Smith McPherson, for appellant

C. E. Richards, for appellee.

REED, J.—The property was shipped at Lenox, in this State, and was consigned to plaintiff at Omaha, Nebraska. At the time the property was delivered to defendant, plaintiff paid the freight charges thereon to its destination, and received from defendant the following bill of lading:

“LENOX, IOWA, November 10, 1880.

“Received from H. H. Hewitt, in apparent good order, by the Chicago, Burlington & Quincy Railroad Company, to be transported to Council Bluffs, Iowa, the following articles, as marked and described below, subject to the general rules of said company and the conditions and regulations of their public freight tariff applying on shipments of freight from this station to the destination named, it being expressly agreed and understood that the said Chicago, Burlington & Quincy Railroad Company, in receiving the said package to be forwarded as aforesaid, assume no other responsibility for their safety than may be incurred on this road: Marks and consignee, H. H. Hewitt, Omaha, Neb. Description of articles as given by the consignee: Car Q. R.; weight, 26,500. Q. 1808. Paid to apply \$50.35. Prepay & R. \$10,000.

On the trial the referee permitted plaintiff to testify against defendant's objection that he made a bargain with defendant's agent at Lenox to ship a car of potatoes at nineteen cents per hundred from Lenox to Omaha. This testimony should have been excluded. The bill of lading embodies the contract between the parties. By its terms, the undertaking of defendant was to transport to Council Bluffs. That was the terminus of its line, and it expressly limited its liability to such responsibility for the safety of the property as might be incurred on its own road. As the property was consigned, however, to a point beyond the terminus of defendant's road, it was bound to deliver it at that point within a reasonable time to some other carrier, to be forwarded to its destination; but it was not liable for injuries which might be caused by the negligence of such other carrier after the property was delivered to it. See *Mulligan v. I. C. R. R.*, 36 Iowa, 181. The parol evidence tended to prove a different undertaking. It tended to prove an undertaking by defendant to convey the property to Omaha. The referee found as a conclusion of law "that defendant is liable to plaintiff for the damages sustained by him by reason of the negligence in not transporting said potatoes to their destination within a reasonable time." This conclusion must have been based on the parol evidence, rather than the written contract. Its admission, then, was prejudicial as well as erroneous.

The property was received by defendant at Lenox on the 10th day of November, and arrived in Council Bluffs on the 11th, and on the 15th it was delivered to plaintiff in Omaha by the Union Pacific Railroad Company, the carrier which forwarded it from Council Bluffs. The weather was warm and pleasant on the 10th, when defendant received the property, but between that and the 15th it turned cold, and the potatoes were badly frozen when plaintiff received them in Omaha. It was material, therefore, to determine whether the injury was occasioned by the failure of defendant to deliver the property to the Union Pacific Company within a reasonable time after its arrival in Council Bluffs, or by the failure of the latter company to deliver it to plaintiff in Omaha within a reasonable time after it received it from defendant. When the car containing the potatoes arrived in Council Bluffs on the 11th, it was at once placed by defendant's yard-master in the yard used for the delivery of freight to the Union Pacific Company. By the usage of the companies, the placing of a car in this yard is regarded as a delivery to the latter company. But defendant's yard-master was informed on the 12th that the Union Pacific Company refused to forward the car in question, for the reason that it was out of repair. He immediately had it removed from the yard to a track belonging to defendant, where it was repaired.

The yard-master testified on the trial that the repairs of the car was completed, and that it was taken back to the yard and deliv-

ered to the Union Pacific Company on the afternoon of the 13th. A receipt for the car from the Union Pacific Company to defendant was introduced in evidence. This receipt was dated on the 11th, but the evidence showed that it was not delivered to defendant until the 14th. The referee found that the car was delivered to the Union Pacific Company on the 14th. This finding must have been based on the fact that the receipt from that company to defendant for the car was delivered on that day, for it is the only evidence of the time of the delivery of the car, except the testimony of the yard-master, who swears it was delivered on the 13th.

Defendant offered evidence tending to prove that, by the usage of the companies, receipts for cars, which are received by one from the other in the afternoon or evening, are not delivered until the next morning after the receipt of the cars; but the evidence was excluded on the plaintiff's objection. It should have been admitted. The fact of the delivery of the receipt on the 14th was regarded by the referee as more satisfactory evidence of the time of the delivery of the car than the testimony of defendant's yard-master. If the usage had been established, that fact, instead of being contradictory of the statement of the witness that the car was delivered on the 13th, would have been entirely consistent with that statement.

For the purpose of proving the time when the car arrived in Omaha, plaintiff introduced his agent, who received the property from the Union Pacific Company at Omaha, and who was permitted, against defendant's objection, to testify that, on the morning of the 15th of November, he called at the freight office of the Union Pacific Company, in Omaha, and was informed by a clerk or agent in the office that the car had not yet arrived, and that he called at the same place at a later hour in the day, when he was informed that it had arrived. The evidence was clearly incompetent, and should have been excluded. It is not pretended that the person who made these statements to plaintiff's agent had any authority to bind defendant by the statements. They were, therefore, mere hearsay, and were inadmissible against defendant.

Appellant claims that the evidence shows without dispute that it performed every undertaking of its contract with plaintiff, and that upon the established facts it is not liable for the injury to the property complained of. As we have already seen, its undertakings were (1) to convey the property to Council Bluffs with safety and dispatch, and (2) to deliver it within a reasonable time to some other carrier at that point, to be transported to its destination. It is not claimed that the evidence shows any failure by defendant to perform the first of these undertakings; but its liability, if any, arises out of its failure to deliver the property within a reasonable time to the Union Pacific Company. Defend-

ant's position is, that by placing the car in the yard of the other company, it delivered it to that company, and that as this was done immediately after the car arrived in Council Bluffs, it used all the diligence which was possible under the circumstances. We think, however, that we would not be warranted in disturbing the judgment on this ground. Defendant's undertaking could be performed only by so placing the property in the possession or under the control of the other carriers as that it would thereby be rendered responsible for its care, and would be obliged to forward it to its destination; and we cannot say from the evidence that it did this before the second or third day after the property arrived in Council Bluffs. The delivery could have been made either by transferring the property from the car in which it was shipped to Council Bluffs to one belonging to the other company, or by turning over the car with the property in it. If the latter course was taken, the other company had the right to demand that the car should be in such condition of repair as that the property could be conveyed in it with safety to its destination. When it placed the car in the yard of the Union Pacific Company on the 11th, it was bound to know whether it was in such condition of repair. When its agents were informed that the other company refused to forward the car to Omaha because it was in bad order, they recognized its right to so refuse, by taking the car back and repairing it. The referee might have found from the evidence that the property was delayed at Council Bluffs for two days or more, and that this delay was occasioned by defendant's attempt to deliver it to the other company in a car which was in such bad order that the property could not be conveyed in it with safety to its destination. We would not be warranted in determining from this evidence that defendant used the defence of diligence in performing its undertaking in this regard which was required of it by the circumstances of the transaction.

Another position urged by appellant is, that the damages are too remote; that they are not the proximate consequence of the negligence complained of, but were occasioned by the elements, a cause entirely distinct from the alleged negligence, and one over which it has no control, and hence there can be no recovery. It is doubtless true that defendant is responsible for such damages only as are the proximate consequence of its own act (Story, Bailm. Sec. 515); and it is not accountable for such loss as is occasioned by the intervention of the *vis major*. One of the undertakings of the common carrier, however, is that he will not expose the property intrusted to his care to any improper hazards or extraordinary perils; and if, by his act or omission, it is exposed to perils or hazards, which ordinary foresight could have apprehended and proved against, he is accountable for such injury as may be occasioned by such exposure. 2 Redf. Rys. 5-7; Story, Bailm. Sec. 509.

In *Morrison v. Davis*, 20 Pa. St. 171, and *Denny v. Railroad Co.* 13 Gray, 481, it is held that the carrier is not responsible for injuries to the property while in his possession caused by sudden and extraordinary floods, notwithstanding the fact that it would not have been exposed to the danger if he had used proper diligence in forwarding it to its destination. But the injury in these cases was occasioned by a cause which human foresight or sagacity could not have apprehended. The holding, therefore, is not in conflict with the rule as we have stated it.

The property in question in this case was perishable. It was shipped at a season of the year when severe weather was to be apprehended, in the ordinary course of nature, in this climate. These facts imposed on the carrier the duty of forwarding it to its destination with dispatch. Great diligence was required of it in the performance of the duty. If, by its negligence, the property was exposed while in its possession to the danger which injured it, we think it is responsible for the injury.

For the errors which we have pointed out the judgment is reversed, and the cause is remanded to the district court for a new trial.

Parol Evidence Inadmissible to Vary Forms of Bill of Lading.—As a general rule, the bill of lading given for goods constitutes in itself the contract of carriage. Evidence is not admissible to prove a parol agreement entered into before or at the time of the signing and delivery of the bill of lading contradictory of the terms thereof. *Long v. New York Central R. R. Co.*, 50 N. Y. 76; *Belger v. Dinsmore*, 51 N. Y. 166; *Collender v. Dinsmore*, 55 N. Y. 200; *Hinckley v. New York Central R. R. Co.*, 56 N. Y. 429; *Oppenheimer v. United States Ex. Co.*, 69 Ill. 62; *Southern Express Co. v. Dickson*, 94 U. S. 549; *Indianapolis, etc., R. Co. v. Remmy*, 81 Ind. 518; *Pemberton Co. v. New York Central R. Co.* 104 Mass. 144; *St. Louis, K. C. & N. R. Co. v. Cleary*, 16 Am. & Eng. R. R. Cas. 122; *Hopkins v. St. Louis & S. F. R. Co.*, 16 Am. & Eng. R. R. Cas. 126.

This, however, is not the law where there is mistake or fraud in the case. *Mobile & Montgomery R. R. Co. v. Jurey*, 16 Am. & Eng. R. R. Cas. 132. And see *Pereira v. Central Pacific R. Co.*, *supra*, which seems to be contrary to the current of the above authorities.

Supplementary Parol Agreement Admissible.—A supplementary parol agreement as to the transportation of goods may be put in evidence. *Malpas v. London, etc., R. Co.*, L. R. 1 C. P. 386; *Dixon v. Columbus, etc., R. Co.*, 4 Biss. 187; *Chouteaux v. Leech*, 18 Pa. St. 224; *Baltimore, etc., Steamboat Co. v. Brown*, 54 Pa. St. 77.

Parol Agreement Cannot Vary Terms of Bill of Lading After its Delivery.—The terms of the bill of lading cannot be shown to have been varied by a parol agreement entered into after its delivery. *Coffin v. N. Y. Central R. R. Co.*, 64 Barb. 379; *Shelton v. Merchants Dispatch Co.*, 86 N. Y. 527; *Bostwick v. Baltimore, etc., R. Co.*, 45 N. Y. 712.

But see *Hill v. Syracuse, etc., R. Co.*, 78 N. Y. 351.

CONDON

v.

MARQUETTE, H. & O. R. Co.

(Advance Case, Michigan, November 19, 1884.)

Where a carrier receives goods to be transported over a connecting line to their final destination, its liability as a common carrier continues until the goods are delivered to the other carrier; and if they are destroyed by fire while in the warehouse of the first carrier, it will be liable for their loss, notwithstanding a custom that the connecting carrier shall inspect the books in which goods are entered as received, and take possession of and transport over its line goods intended to be so transported.

ERROR to Houghton.

Chandler, Grant and Gray, for plaintiff.

W. P. Healey, for defendant and appellant.

COOLEY, C. J.—The plaintiff shipped goods from New York by the New York Central & Hudson River Railroad Company, directed to himself at Hancock, Michigan, and they were carried in succession by connecting carriers until they were delivered by the Chicago & Northwestern Railway Company to defendant, at Negaunee, on March 12, 1883. The goods were carried by defendant over its road to L'Anse, where they arrived March 13, 1883, and were placed in defendant's warehouse. There they remained until March 20, 1883, when they were destroyed by an accidental fire. L'Anse was the terminus of railroad transportation. From thence to Hancock goods were carried in boat during the season of navigation, and by teams for the remainder of the year, by a carrier known as the L'Anse & Houghton Overland Transportation Company, which occupied for its purposes at L'Anse the warehouse of the defendant. It seems to have been the customary mode of business for the receipts of goods to be entered at the warehouse upon books of the defendant, which were open to inspection by the L'Anse & Houghton Overland Transportation Company, and which were regularly inspected by the agent of that company to ascertain what goods were to be taken by it. That company was then accustomed to take the goods for Hancock and other places on its line, load them in sleighs or other vehicles at the warehouse, and then receipt for them to the defendant. When the goods of the plaintiff were received by defendant, no notice was given to him, nor was the attention of the agent of the transportation company called to them, or any request made that they should be removed. They simply

remained in the warehouse, without action by any one in respect to them, until the fire took place. The goods having been destroyed, plaintiff claimed from the defendant payment of the value, and, that being declined, the present suit was instituted.

The first count of the declaration charged the defendant as common carrier with the duty to carry the goods over its line to L'Anse, and there deliver them to the L'Anse & Houghton Overland Transportation Company; and the breach of the duty alleged was the failure to deliver to that company. The trial judge instructed the jury that if the goods were shipped from New York, consigned to or marked for the plaintiff at Hancock, Michigan, and came into the hands of the defendant from the Chicago & Northwestern Railway Company to be carried by defendant in the usual course of its business to L'Anse, there to be delivered to the L'Anse & Houghton Overland Transportation Company for transportation to Hancock, then the defendant received such goods as a common carrier, and remained such common carrier during the transportation of the goods to L'Anse, and after their arrival there for such reasonable time as, according to the usual course of business with the L'Anse & Houghton Transportation Company, would enable defendant to deliver the goods to that company; and no delay in taking goods on the part of the transportation company, incident to the usual course of business between the two companies, would exonerate the defendant from its liability as a common carrier. It would be the duty of the defendant to deliver or offer to deliver the goods to the L'Anse & Houghton Transportation Company to be transported to Hancock; and if the goods were not so delivered or offered to be delivered, plaintiff was entitled to recover. Under this instruction the plaintiff had judgment, and the defendant brings error.

The question which the instruction presents is one upon which the authorities are somewhat divided. It received careful attention at the hands of the New York Court of Appeals in *McDonald v. Western Railroad Corporation*, 34 N. Y. 497, where several opinions were delivered. The facts upon which the decision was to be made were in all respects similar to those now before us, and the judges were unanimous in holding that the railroad company was liable. Wright, J., said: "The goods had been received by the defendants at Chatham, to be transferred to Binghamton by way of the Erie & Chenango canal. Their obligation, therefore, was to carry the goods safely to the end of their road, and deliver them to the next carrier on the route beyond. A carrier, in such case, does not release himself from liability by simply unloading the goods at the end of his route and placing them in his own storehouse, without delivery or notice to, or any attempt to deliver to, the next carrier."

Hunt, J., in a concurring opinion, referring to *Ladue v. Griffith*,

25 N. Y. 364, as a somewhat similar case, said: "The defendants in the present case did no act indicating that they had renounced the liability of a carrier. They simply unloaded and deposited the goods in their warehouse. Had this deposit been made in the warehouse of a company engaged in canal transportation westwardly, it would have been an act of great significance. But here the fact is expressly found that it was the custom of the further carrier to take the goods from the defendants' depot. The liability of the further carrier did not commence until he removed the goods from the defendants' warehouse. The deposit, therefore, by the defendants in their own warehouse did not afford any evidence of a renunciation of the carrier's liability." And he added that the deposit of the goods in the warehouse was to be considered a mere accessory to the carriage by defendant, and that their liability as carrier was therefore unbroken.

This decision was approved as sound and followed as authority in *Mills v. Michigan Cent. R. Co.*, 45 N. Y. 622, and it is undoubtedly the settled law of New York at this time. The same doctrine was laid down in *Conkey v. Milwaukee, etc., R. Co.*, 31 Wis. 619, in a forcible opinion by Chief Justice Dixon, and also in *Irish v. Milwaukee, etc., R. Co.*, 19 Minn. 376 (Gil. 323); s. c. 18 Amer. Rep. 340, which cites with approval the case in 34 N. Y. Rep. The like doctrine also appears to be recognized in *Erie R. Co. v. Lockwood*, 28 Ohio St. 358; *Brintnall v. Saratoga, etc., R. Co.*, 32 Vt. 665; *Packard v. Taylor*, 35 Ark. 402; and *Louisville, etc., R. Co. v. Campbell*, 7 Heisk. 253. It was also affirmed in *Michigan Cent. R. Co. v. Manufacturing Co.*, 16 Wall. 318. This last case expresses views not in harmony with the opinion of the court respecting a certain clause in the charter of the Michigan Central Railroad Company as expressed in *Michigan Cent. R. Co. v. Hale*, 6 Mich. 243, and same *Company v. Lantz*, 32 Mich. 502; yet, as the question now under consideration was considered and decided by the court upon common law principles, the conflict of views on the question of construction is of no importance in this case.

We think these cases lay down a rule which is just to the shippers of goods, and not unreasonably burdensome to carriers. The shipper delivers his goods to a carrier, who becomes insurer for their safe transportation; and if the operations of one carrier cover a part only of the line of transit, and another is to receive the goods from him, the shipper has a right to understand that the liability of an insurer is upon some one during the whole period. The duty of the one is not discharged until it has been imposed upon the succeeding carrier, and this is not done until there is delivery of the goods, or at least such a notification to the succeeding carrier as, according to the course of the business, is equivalent to a tender of delivery. There is nothing in this which

is burdensome to the carrier, for this is the customary method in which the business is done; and the rule only requires that the customary method shall be pursued without unreasonable delay or negligence.

The connecting carriers in this case appear to have established a custom of their own, under which actual delivery of the goods or notice to take them was dispensed with, and the one was to ascertain from the books of the other what goods were ready for reception and further carriage. This, as between themselves, was well enough while it worked well; but it was an arrangement to which the plaintiff was not a party, and the defendant could not, by means of it, relieve itself of any liability which duty to the plaintiff imposed. And it was clearly its duty to the plaintiff, as we think, to relieve itself of the responsibility of the goods remaining for an unreasonable time in its warehouse, and to do this it was necessary that the responsibility be transferred to the carrier next in line. But the mere permission to inspect its books and take whatever was ready for carriage would not do this; there should have been distinct notice which would apprise the other carrier that defendant expected the removal of the goods.

In this case there were no facts indicating a renunciation, as to these goods, of the liability of common carrier by the defendant, or that it was supposed by the agents of the defendant that that character had been exchanged for any other. If it ever was, it must have been at the moment the goods were received, for nothing took place afterwards to change the relation of the defendant to the goods until the fire took place. But we are not ready to assent to the doctrine that a railroad company, as to goods transported by it, ceases to be carrier the moment the goods are received at its warehouse. We do not think that this is the law, or that it ought to be.

The judgment should be affirmed.

Champlin and Sherwood, JJ., concurred.

CAMPBELL, J.—In this case it is admitted by the undisputed facts that the property in question had been in defendant's warehouse for a longer time than was generally necessary for the removal of goods by the ultimate carrier, and that the failure was due to a lack of means of removal in the latter. It also appears that the property was in a warehouse from which the last carrier always took it without any further ceremony, and that this carrier was always informed by inspection of the way-bills and knew of the goods being ready for removal. I think that under such circumstances defendant no longer remained responsible as carrier, but became subject to no more than a warehouseman's responsibility as soon as the last carrier had actual notice and could have removed them, and that respondent is not to be prejudiced by the

lack of facilities in that carrier, who had the same means of access to and control over the goods. Such seems to me the purpose of our statute, which does not declare or provide that the liability of warehousemen for goods awaiting delivery shall not arise when the real duties of carrier have been fulfilled, but merely requires that the responsibilities attaching to a carrier shall not be lessened while that relation exists.

General Reference.—As to the authorities upon the question raised in the principal case, viz., the liability of a railroad company for goods stored at the terminus of its line awaiting transportation by a connecting line, see *Petersen et al. v. Case, Receiver, etc.*, and note, *infra*.

PETERSEN *et al.*

v.

CASE, Receiver.

(*Advance Case, U. S. Circuit Court, E. D., Wisconsin, October 16, 1884.*)

When goods are to be delivered by a railroad company to a second line of conveyance for transportation further on, the common law liability of common carriers remains on the first carrier until he has delivered the goods for transportation to the next one. Its obligation while the goods are in its depot does not become that of a warehouseman.

Where, while goods received by the first carrier are in transit, the connecting line notifies it that it cannot receive the goods and transport them to their destination because of a block in freight, this will not relieve the first carrier from liability for damages caused by the delay, where it fails to notify the shipper and give him an opportunity to dispose of the property or take measures for its preservation.

The measure of damages in such a case is the difference between the market value of the goods at the place of destination when they ought to have been delivered and their market value when they were delivered.

AT LAW.

G. W. Cate, A. J. Smith and W. J. Turner, for petitioners.

Theodore G. Case and W. C. Larned, for receiver.

DYER, J.—In the foreclosure of a mortgage on the Green Bay & Minnesota Railroad, in this court, the respondent was appointed receiver, and as such was empowered to operate the road pending the receivership. In October, 1881, he was so operating the road, the eastern terminus of which was at Ft. Howard, where there existed connections with the Chicago & Northwestern Railway for the transportation of freight shipped on the receiver's line of road, and destined for Chicago. On the 3d day of October, 1881, the petitioner Petersen shipped over the respondent's road, at Amherst Junction, Wisconsin, two car-loads of potatoes consigned

to a commission house in Chicago. On the fifth day of the same month he shipped from the same place, over the same line of road, two other car-loads of potatoes, consigned to the same parties as were the first. On the third day of the same month the petitioners, Allington & Co., also shipped over the receiver's line of road, at Amherst Junction, one car-load of potatoes, consigned to a commission firm in Chicago. The course of transit was over the Green Bay & Minnesota road, from Amherst Junction to Ft. Howard, thence, *via* the Chicago & Northwestern Railway, to Chicago.

In the Petersen cases bills of lading were issued to the shipper, wherein it was stated that the potatoes were received "in apparent good order by the receiver of the Green Bay & Minnesota Railroad, * * * to be transported over the line of this railroad to Chicago, and delivered after payment of freight, in like good order, to a company or carrier (if the same are to be forwarded beyond the lines of this railroad), to be carried to the place of destination, it being expressly agreed that the responsibility of the receiver shall cease at his depot, at which the same are to be delivered to such carrier." The bills of lading also contained this further clause: "It is further especially agreed that, for all loss or damage occurring in the transit of said packages, the legal remedy shall be against the particular carrier or forwarder only in whose custody the said packages may actually be at the time of the happening thereof; it being understood that the receiver of the Green Bay & Minnesota Railroad assumes no other responsibility for their safe carriage or safety than may be incurred on his own road." The bill of lading in the case of Allington & Co. was like those issued on the Petersen shipments, except that it was therein stated that the property was to be carried over the Green Bay & Minnesota road to Green Bay, "and delivered, after payment of freight, in like good order, to C. & N. W., * * * to be carried to the place of destination." This difference in the terms of the bills of lading is not material, because it must have been the understanding of the parties that the carriage of the property over the line of the Green Bay & Minnesota road terminated at Ft. Howard, and that it was to be there delivered by the receiver to the Chicago & Northwestern Railway for transportation to Chicago.

It appears from the proofs that the potatoes shipped at Amherst Junction on the 3d of October reached Ft. Howard at five o'clock P. M. of that day; that of the shipments of October 5th, one arrived at Ft. Howard at five P. M. of that day, and the other at the same time of day on the 6th; and the evidence shows that within twenty-four hours after the arrival at Ft. Howard of each of these shipments, a freight train left that place for Chicago on the Chicago & Northwestern road. The precise character of the running connections between the two roads at Ft. Howard is not

shown; but it is evident that there was a business arrangement between them by which freight brought to Ft. Howard over the Green Bay & Minnesota road, and consigned to points south and east, was transferred to the Chicago & Northwestern road, and forwarded to its destination; and that the cars of the former road, containing bulk freight brought from points inland, were run upon the track of the latter road at Ft. Howard, without breaking bulk, and were put into the trains of the Chicago & Northwestern Company, and taken through to points on its road to which the freight was consigned. It is shown that at Ft. Howard there was a Y track connecting the Green Bay & Minnesota road with the Chicago & Northwestern, and, by the course of business, cars from points on the former road, containing freight destined south, were switched from the respondent's yard tracks, by his employes, to the Y track, and were there taken by the employes of the Chicago & Northwestern Company and placed in the trains of that company; so that delivery of such cars to the latter company was accomplished when they were placed on the Y.

It appears from the testimony that from about the 3d to the 10th of October, 1881, there was a freight blockade at Chicago, which, it is claimed, rendered it impossible for the Chicago & Northwestern and certain other railroad companies to promptly deliver certain kinds of freight to consignees in Chicago. This blockade was occasioned by the inability of roads running east to take away the cars containing through freight destined east, as fast as they arrived on roads running north and west; by reason of which state of things there was an accumulation of cars containing through freight bound east, which prevented the handling of cars constantly arriving, containing freight to be delivered to Chicago consignees. In consequence of this pressure of freight, the Chicago & Northwestern Company, on the 5th day of October, requested the respondent to stop shipments of potatoes and barley in bulk from points on his line to Chicago until the 12th, and all agents at stations on the respondent's road were immediately instructed to refuse such shipments. It would seem that the respondent did not receive notice of the Chicago blockade, and, consequently, did not notify his agents until after the cars containing the potatoes here in question had left Amherst Junction, and were either in transit to or had arrived at Ft. Howard. Having arrived at that point, the agent there in charge—who was the joint agent of the two roads—was instructed not to place the cars on the Y for delivery to the Chicago & Northwestern Company until October 10th. Accordingly, these cars, with their contents, remained in the respondent's yards until that day, when they were delivered to the Chicago & Northwestern Company, and reached their destination on the 11th or 12th of the month. On delivery to the consignees, the potatoes in all the cars were found to be so

seriously decayed that a large loss was sustained in the sale of them; and this loss, which the petitioners attribute to delay in their transportation, they seek to recover from the respondent.

In resisting the petitioners' demands, the respondent claims that the potatoes were unsound when they were shipped at Amherst Junction, and there is considerable testimony bearing upon this issue of fact. It is unnecessary to discuss this testimony in detail. The bills of lading issued by the respondent state that the potatoes were received for transportation in apparent good order, and on the part of the petitioners it is shown that the potatoes were loaded from wagons into the cars as received; that they were examined and assorted with care; and that when shipped they were in sound merchantable condition. This is very positively sworn to by the shippers, and by various witnesses who handled the potatoes. It is also in proof that other potatoes shipped to Chicago at about that time, and which were transported in the usual time over another line of road, arrived in good merchantable condition. On the part of the respondent, it is shown that the season of 1881, in consequence of continued wet weather through the month of September, was an extremely unfavorable one for the shipment of potatoes. Some of the witnesses testify that they sustained heavy losses from decay of potatoes shipped from points near Amherst Junction to Chicago which were not delayed in transit, but none of them purchased and shipped potatoes at Amherst Junction, nor did they see the potatoes which the petitioners shipped. Experts testify that potatoes which were dug before they were fully ripe, and freshly shipped, in the state of weather then prevailing, were extremely liable to develop unsoundness, and that this could not be prevented by the utmost dispatch in transportation. They also express the opinion that if the potatoes in question were sound when shipped, they would have sustained no injury by the delay proven in this case. In considering this testimony, my mind has not been free from doubt upon the question of fact in dispute, and it must be admitted that the respondent's contention is not without support, if the testimony which he adduces is entitled to weight. In short, if the opinions of experts, and the experience of other shippers, and the testimony which tends to show that the potato crop of 1881, in northern Wisconsin, was exceptionally liable to disease, are to prevail against the positive testimony of the petitioners, and of witnesses who handled these potatoes, and the fact that other potatoes shipped from the same locality, and transported with usual dispatch, arrived in Chicago in merchantable condition, then the conclusion must be that the loss sustained by the petitioners is attributable to unsoundness of the potatoes when they were shipped. But giving to the evidence adduced by both parties its due weight, one side being supported by positive assertions of fact, founded upon personal observation and knowl-

edge, and the other by opinions and conclusions deduced from a general state of facts perhaps not applicable to the particular case, the court, in the exercise of a judicial judgment, must conclude that the fact in dispute is as proven by the petitioners. The evidence on their part is positive; that on the part of the respondent is in its nature negative, based rather on supposition and conjecture than on knowledge of the facts in the particular case.

So, too, upon the evidence before the court, the conclusion must be that the injury to the potatoes resulted from the delay in their transportation. Each car contained between 400 and 500 bushels. The weather at the time, in the language of the witnesses, was warm, damp and muggy. The potatoes may not have been, strictly speaking, perishable property, according to the ordinary classification of railroad freight. But the season was such that delay in their transportation was hazardous. The proofs show that from the 3d to the 11th of October the temperature at Ft. Howard ranged at midday from 50 degrees to 76 degrees above zero. It appears that the three car-loads shipped on the 3d, and which were consequently longest delayed, were most seriously injured, and one of these is described as steaming with heat and decay on arrival in Chicago. This was a car containing 470 bushels, then worth, if in sound condition, one dollar per bushel, but for which the petitioners, Allington & Co., realized only sixty-nine dollars. The testimony tends to show that the process of decay, once begun, would rapidly go on where, in such weather, potatoes in such quantities were confined in a close box car of ordinary construction, in which there were not free circulation of air and opportunity for the moisture to evaporate. Taking the evidence as it stands, I must hold that the petitioners proved, at least *prima facie*, the soundness of the potatoes when shipped. The burden of showing that they were not sound then fell upon the respondent, and this he has not shown by such testimony as outweighs that of the petitioners and their witnesses. It need only be added in this connection that if the original injury was attributable to the fault of the respondent, then he is legally chargeable, as between him and the petitioners, with the continuing consequences of that fault; namely, the loss resulting from the continued decay of the potatoes while in the whole course of transit to Chicago.

The question of legal liability upon the facts as proven remains to be considered. The learned counsel for the respondent argued at some length, and cited many authorities upon the point, that, as a common carrier, he was not liable for any negligence or delay in transportation occurring on the connecting carrier's line. Admitting this to be so, it does not appear that the point is a material one in the case. The respondent was under obligation to safely deliver the potatoes to the next carrier in the line in as

good order as when received. As we have seen, according to the course of business between the two carriers, delivery of such freight was made by placing the cars on the Y at Ft. Howard, where they were taken away by the Chicago & Northwestern Company. Until the cars containing these potatoes were thus delivered, they remained in the possession of the respondent, and his common law liability as a carrier continued until such delivery. The law on this subject was settled in *Railroad Co. v. Manufacturing Co.*, 16 Wall. 318, where it was held that when goods are delivered to a common carrier, to be transported over his railroad to his depot, in a place named, and there to be delivered to a second line of conveyance for transportation further on, the common law liability of common carriers remains on the first carrier until he has delivered the goods for transportation to the next one. His obligation while the goods are in his depot does not become that of a warehouseman. While, therefore, these cars of potatoes were in the possession of the respondent at his depot in Ft. Howard, they were, in the eye of the law, still in transit, and the liability of the respondent therefor continued unbroken, except as such liability may have been limited by the bills of lading, until they were actually delivered to the next carrier in the line. *Railroad Co. v. Mitchell*, 68 Ill. 471; *Conkey v. Railroad Co.*, 31 Wis. 619. The clause in the bills of lading that the responsibility of the receiver should cease at his depot must be read in connection with the other provisions of the contract. That clause did not qualify the obligation of the respondent to deliver the freight to the Chicago & Northwestern Company, and to deliver it in as good order as when received. It was at the depot, or presumably within the depot limits, that such delivery was to be made; that is, on the Y track connecting the two lines, and used for that purpose.

The respondent's general liability being as heretofore stated, was his failure to promptly deliver this freight to the Chicago & Northwestern Company excused by the refusal of that company to take it in consequence of the blockade at Chicago, and what duty, if any, in view of the action of that company, did the respondent owe to the petitioners? It is to be observed that the notice of the Chicago & Northwestern Company to the respondent, that it would not receive further shipments of potatoes and barley from his road until October 10th, was not given until after the petitioners' property was in transit. The first carrier was then in possession of the property, exercising control over it as a common carrier. It may be doubtful whether the evidence shows such an inability to deliver freight to Chicago consignees at that time as would excuse the last carrier from the obligation to complete the transportation of freight which had been previously received by the first carrier and was then actually in transit. But I take it

that is exclusively a question between the two carriers, and with which the petitioners have no concern. If the refusal of the Chicago & Northwestern Company to receive this freight from the respondent was a violation of any business arrangement between the two carriers—a question not arising here—that might raise a controversy between them, but it would concern them alone, and the rights of the petitioners ought not to be affected thereby. I do not forget the case of *Helliwell v. Railway Co.*, 10 Biss. 170, in which this court held that if at the time of making a contract for shipment of freight the carrier has no doubt, and if the condition of business on its lines gives it no ground for doubting, that suitable means will be at its command within the usual and ordinary time for conveying the freight, and if all reasonable efforts are seasonably employed to obtain such means, and the delay is solely occasioned by an extraordinary influx of freight upon its lines arising subsequently to the making of the contract, the carrier will not be held responsible for the delay. But this presupposes that there was no negligence on the part of the carrier. And here we touch the point upon which, in its legal aspect, these cases turn. Conceding that the inability of the respondent to forward the potatoes from Ft. Howard was attributable to causes which he could not control, it then became his duty to use all reasonable means to preserve the property from loss, and to that end he should have notified the shippers that the property could not be forwarded, thereby enabling them to otherwise dispose of the property, or to take measures for its preservation. If the potatoes when shipped were not, in a strict sense, perishable property, it is evident they became such while in the respondent's custody. He knew on the 5th of October that they could not be forwarded before the 10th, and would not in due course reach their destination before the 11th or 12th. The petitioners were shippers at a point not remote on his line of road, and it was not difficult to notify them of the situation of their property. I think it was his duty, as the custodian of the property, to give them such notice, and thus enable them to protect themselves, as far as possible, against loss.

In *Conkey v. Railway Co.*, 31 Wis. 637, Mr. Chief Justice Dixon was of the opinion that in the case of an interruption of transportation from extraordinary causes, rendering it impossible to send merchandise forward, the carrier might store the property, and at once give notice to the owner, and thus absolve himself from liability as a carrier. It is not claimed that any notice was given to the petitioner Petersen. The station agent testifies that he told the petitioner Allington, on the 7th of October, that the potatoes were then at Green Bay, and requested him to inform Petersen. But Allington unqualifiedly denies this. The petitioners Petersen and Een swear that they had no information as to

the whereabouts of the potatoes, and there is no proof to the contrary. Another witness, not a party to these cases, testifies that on the 12th of October he was at the Amherst Junction station with Allington, Petersen and one Couch, who had something to do with the shipments; that Couch asked the station agent if he knew or could tell where the cars of potatoes were, and that he answered he could not. The station agent testifies that he first heard that the cars were at Ft. Howard on the 7th, which was four days after part of the potatoes had been shipped from Amherst Junction, and there is evidence that one of the petitioners called on the agent almost daily for information about the potatoes, but got none. There is no proof that anything was done with the potatoes at Ft. Howard, except to leave them as they were shipped, in the car on the side track; and deciding this question, as I must, upon the preponderance of testimony, I am obliged to hold that notice to the shippers of the delay and situation of the property is not proven, and therefore that the respondent held the potatoes during the period of delay subject to the common law liability of a common carrier.

The measure of damages in these cases is the difference between the market value of the potatoes in Chicago when they ought to have been delivered, and their market value when they were delivered. Under this rule of damages, the petitioners, upon the testimony, are entitled to recover the amounts claimed by them in their petitions, and orders will be entered requiring the respondent to pay to the petitioner Petersen the sum of \$863.63, and to the petitioners Allington & Co. the sum of \$367.70.

Railroad Company is Liable as Common Carrier for Goods in Storage at Terminus Awaiting Transportation Over Connecting Lines.—In those cases where by the terms of a special contract or by the law of a State a railroad company receiving goods for transportation to a point beyond its own line assumes no extra terminal liability, it is nevertheless not exempt from liability until it has actually delivered the goods to the next carrier in the line. While stored in its warehouse or station awaiting transportation by such next carrier, the liability of the said company is that of a common carrier. *Railroad Co. v. Manufacturing Co.*, 16 Wall. 318; *Conkey v. Railroad Co.*, 31 Wis. 619; *Railroad Co. v. Mitchell*, 68 Ill. 471; *Irish v. Milwaukee & St. P. R. Co.*, 19 Minn. 376; *Reynolds v. Boston & Albany R. Co.*, 121 Mass. 291; *McDonald v. Western R. Corp.* 34 N. Y. 497; *Ladue v. Griffith*, 25 N. Y. 364; *Mills v. Michigan Central R. Co.*, 45 N. Y. 622; *Brintnall v. Saratoga, etc., R. Co.*, 32 Vt. 665; *Erie R. Co. v. Lockwood*, 28 Ohio St. 358.

But see *Armstrong v. Grand Trunk R. Co.*, 2 Pugo & B. (N. B.) 445; *Michigan Central R. Co. v. Hall*, 6 Mich. 243; *Michigan Central R. Co. v. Lantz*, 32 Mich. 502; *Denning v. Norfolk & W. R. Co.*, 16 Am. & Eng. R. R. Cas. 232.

Company Bound to Notify Owner in Case of Obstruction of Connecting Lines.—When a railroad company in such case is unable to forward freight by the next connecting lines owing to an obstruction thereof, it is bound to retain the goods and notify the owner so that he may reclaim them. If it fails to give such notice, the company is liable for the delay. *Louisville & N. R. Co. v. Campbell*, 7 Heisk. (Tenn.) 253; *Lesinsky v. Great Western Despatch Co.*, 10 Mo. App. 184.

And see *Dunn v. Hannibal & St. Joe. R. Co.*, 68 Mo. 268; *Rice v. Kansas Pacific R. Co.*, 63 Mo. 314.

But see *Frank & Co. v. Memphis & C. R. R. Co.*, 52 Miss. 570.

Measure of Damages for Delay in Transporting Goods.—In case of delay in the transportation of goods, the proper measure of damages is the difference between the market value of the goods when delivered and that at the time they should have been delivered. *Newell v. Smith*, 49 Vt. 255; *Illinois Central R. R. Co. v. Cobb*, 72 Ill. 148; *Devereux Receiver v. Buckley*, 34 Ohio St. 16; *Rankin v. Pacific R. Co.*, 55 Mo. 167; *Detroit & Bay City R. Co. v. McKenzie*, 43 Mich. 209; *Lindley v. Richmond, etc., R. Co.*, 9 Am. & Eng. R. R. Cas. 81; *Evansville, etc., R. Co. v. Montgomery*, 9 Am. & Eng. R. R. Cas. 195; *Louisville & N. R. Co. v. Mason*, 11 Lea (Tenn.) 116; s. c. 16 Am. & Eng. R. R. Cas. 241.

BALTIMORE & O. R. Co. *et al.*

v.

ADAMS EXPRESS CO.

(*Advance Case, U. S. Circuit Court, E. D. Missouri, October 21, 1884.*)

It is not the duty of common carriers to pay antecedent charges on freight tendered to them by connecting carriers, even where it is customary to do so.

In Equity.

The bill states that it is the usage and custom among express companies, known to and heretofore acted upon by the defendant and by all other express companies, "that when a package of express matter is tendered to the connecting express company, it receives the same and pays the tendering express company the charges which have accrued thereon for the services rendered by it, and thereupon transmits said parcel to another express company, or the point of destination, if the same is reached by it, and collects the same, with its own charges, from the consignee," and that the defendant and other specified express companies, with which the complainants "have heretofore conducted a very large business upon the basis of the usage aforesaid, have combined, confederated and conspired for the purpose of destroying the express business of your orators, and for that purpose have suddenly, from different points, given verbal and other notices to the agents of your orators that on and after the 15th day of October, 1884, the said companies would not advance charges on express matter transferred to them by your orators." The other material facts are stated in the opinion of the court.

Garland Pollard, for complainant.

Rumsey, Maxwell & Matthews and *Samuel Breckenridge*, for defendant.

TREAT, J.—This is an application for an injunction to restrain the defendants from refusing to receive packages in the same manner they have heretofore received them, and to compel them to prepay the charges. It is very well known that like questions have heretofore been presented to this court, in regard to which I have been a dissenting judge. In the conduct of business by these corporations, or *quasi* corporations, which to a greater or less extent fasten themselves upon the common business of the country through railroads and otherwise, very conflicting questions arise, because a railroad is bound, as a common carrier, to perform all the duties imposed upon it as such. It chooses to sublet, if you please, or fasten upon itself contracts with regard to these outside corporations, and by so doing puts itself in a condition that subjects the public at large to obligations or difficulties which, if the railroads themselves performed what they are required by law to perform, the shippers would be relieved of those difficulties. For illustration, a railroad exists; it is bound by law as a common carrier to perform its duties through one or the other contrivance. It fastens upon itself a fast freight contract, or an express contract. Where are its obligations? Is it to relieve itself of those, and remit the party to these outside corporations? Constant complications are arising with regard to such organizations. My brother judges would say that the courts might, to a large extent, regulate the mode of transacting business, each with the other, and one company enforce on the other and enforce upon the railroads a duty, as Mr. Pollard says, of doing business each for the other without discrimination.

Now, as far as I am concerned judicially, I have no faith in any such doctrine, but authorities superior to myself have, and in the light of the authority that is thus presented I must pass upon the question before me. Accepting, then, the proposition in the light of such authorities, all who act as common carriers must perform their functions without discrimination. Does that discrimination go so far as to say that they must pay antecedent charges, and trust the opportunity at the other end of the route of ever receiving anything? Must it advance to the shipping company all prior expenses incurred, and run the chances of ever collecting anything? What is the policy? At this end of the line, so to speak, shall they pay all these antecedent charges from Portland, Maine, for instance, under a C. O. D., and, not knowing the contents of the package, allow it to go forward? Is that the proposition of law? If the company at this end of the line, for illustration, has paid the advance charges, who is responsible therefor? The shipper and the company transporting? The charges advanced for the benefit of the company from whom it receives, as well as for the shipper of the article itself. Suppose it does not choose to trust the shipper or the company. Suppose both are insolvent

—utterly insolvent. Is it bound to pay, day in and day out, the money required in such matters, with no possibility of receiving a sixpence remuneration for the transaction?

Now, I do not know, in the case here submitted, whether this discrimination, if there is such, does not rest on a sound proposition, to wit, that the shipping express company cannot respond for the advances. I do not know how that is. I think, from the statement made here, that nothing appears in regard to that matter. Is that so?

Mr. Pollard.—I think there is nothing said in regard to the responsibility of the company; but that is a point that will, I think, be conceded.

The Court.—Very well: the defendant has a perfect right, and that is my judgment, to refuse to pay charges on shipments made to it by any express company or any railroad company, unless a sufficient guaranty in some form is given to it whereby no discrimination may occur.

Mr. Pollard.—I suppose neither of these gentlemen will complain that this corporation is not responsible?

The Court.—I have to take the case as I find it. It is not a question of the responsibility of the railroad. If we take them, we have to take them on the responsibility of the consignor. The part I am determining, and that is all there is in this case, is that an express company or a railroad company is not bound to prepay antecedent charges for anybody. It may or may not. If it chooses to do it for one company, because it considers it perfectly solvent, it can do it. If it chooses to doubt the solvency or responsibility of the other company or shipper, it has a right in the conduct of its affairs so to do. It is not bound to advance money for anybody. It has a right to transport goods without prepayment if it chooses,—I mean it is bound to do it,—but without being compelled to prepay charges. That is my theory of the administration of the business in this country, and I shall refuse the injunction. You ask these companies to advance payment for previous transportation, and they are not bound to advance anything to anybody.

Mr. Pollard.—I understand your honor does not put it on the ground that it does not appear the complainants are not responsible for these charges?

The Court.—No; I do not put it on that ground. I put it on this direct and positive ground: that no common carrier is bound to pay advances on packages brought to it to be transported thereafter, if it chooses to object thereto.

Mr. Pollard.—Whether it carries for others or not?

The Court.—Yes; anybody. That is the proposition I have been contending for during thirty years, and I have been over it so often that the older I grow the more positive I am in regard to it.

Mr. Pollard.—On that theory, of course, it will be of no use to amend the bill.

The Court.—Well, you may amend it, and it will be heard in that form; but I decide it now on the distinct ground that no common carrier is bound to pay the charges of a prior carrier at all.

Mr. Pollard.—That covers the ground.

The Court.—That is all there is of it. It is not bound to advance money to pay somebody else. It is the business of the shipper to look out for that himself.

Mr. Maxwell.—Then I understand the order will be that the application for an injunction is refused, and the temporary order heretofore issued dissolved?

The Court.—Certainly; as I have already said, the obligation of one carrier to the other is not that the carrier receiving the goods is bound to pay the advance charges. He may or may not at his option. There may be reasons why he should pay for one and not for the other, precisely the same as an individual might be willing to accept an obligation as a matter of courtesy and not as a matter of duty; and if the corporation chooses to say, "I will not advance your charges for the purpose of transportation," it has a perfect right so to do, and will not be held liable for the obligations, not only of itself, but of all the corporations over whose lines the goods are being shipped indefinitely. For the outcome may be, while it may nominally appear that the goods are of great value, in reality they may be of no worth. Then what? There is the ordinary C. O. D. transaction. It has to go back, necessarily, *seriatim*, to collect from this, that and the other company, all their respective charges, and there may be half a dozen intervening roads before it reaches the end. Why is it bound to carry that burden? It is not bound to do it. That is the view of this court, and has been for thirty years, and I still adhere to it.

There is another proposition connected with this matter that I may as well state. For illustration, a shipment is made by a railroad from Portland, Maine, to Denver, whereby there is a through shipment without any agreement between the intervening roads. The original shipper, to wit, the Portland, Maine, road, may be responsible for the safe delivery at Denver; but suppose a road from Kansas City to Denver is not a party to that agreement, is it to be bound by the arrangement thus made? It is only bound as a common carrier from the time the shipment came to it, and not as to anything antecedent thereto. It is not responsible for what occurred, therefore, unless it is an express party to the contract. The application for this injunction will, therefore, be denied.

Back Freights on Connecting Lines.—It has undoubtedly become customary among carriers forming a series of connecting lines, to pay each in turn the back freights already earned, the last carrier in the line collecting

the whole from the consignee. As to the law upon this subject, see the following cases: *Potts v. New York & New England R. R. Co.*, 3 Am. & Eng. R. R. Cas. 424; *Marsh v. Union Pacific R. R. Co.*, 6 Am. & Eng. R. R. Cas. 359; *Vaughan v. Providence, etc., R. R. Co.*, 9 Am. & Eng. R. R. Cas. 41; *Knight v. Providence, etc., R. R. Co.*, 9 Am. & Eng. R. R. Cas. 90.

TAYLOR & Co.

v.

LITTLE ROCK, MISSISSIPPI RIVER & TEXAS RAILROAD COMPANY.

(39 *Arkansas Reports*, 148.)

Common carriers may contract against liabilities for losses, etc., occurring from unavoidable accident, either upon their own or a connecting line. They may also contract against their common law liability as insurers of the goods carried by them; but it is against public policy to permit them to contract for exemption from liability for losses and damages to goods happening from their own or their servants' negligence.

At common law, a common carrier is an insurer of the goods which he undertakes to carry; and a contract of exemption from liability as insurer, for loss by fire, etc., must, like other contracts, be founded upon some consideration.

APPEAL from Jefferson Circuit Court.

McCain and Cranford, for appellants.

1. Common carriers were insurers, etc., except against the act of God and the public enemy, by the common law, and no restrictions by contract were allowed. *Gould v. Hill*, 2 Hill, 623; *Lawson on Carriers*, Sec. 24, *et seq.* But in modern days such restrictions have been relaxed as to liability, in consideration of reduced rates, etc., over its own lines, and where connecting lines are used over such. In the latter case, there are authorities that carriers may make restrictions that would inure to the benefit of connecting lines, where a through rate is guaranteed, but such is not this case. The receiving carrier did not *guarantee a through rate, nor undertake through transportation*, and appellee was at liberty to charge its customary rates, and no exemptions inured to its benefit. *Hutchinson on Carriers*, Secs. 271-2-3-8; *Chambler v. McKenzie*, 31 Ark. 162; *Story on Contracts*, Sec. 450; 1 *Parsons on Cont.* 389; *Babcock v. L. S. & M. S. R. Co.*, 49 N. Y. 491-7; *Manhattan Oil Co. v. C. & A. R. R. & T. Co.*, 54 N. Y. 197; *Ætna Ins. Co. v. Wheeler et al.*, 49 N. Y. 617; *Camden & Amboy R. R. v. Forsythe*, 61 Penn. 81.

M. L. Bell and *L. A. Pindall*, for appellee.

The clear intention of the contract was to give all the carriers under the bill of lading all the exceptions reserved. See our

brief in *L. R., M. R. & T. R. Co. v. Talbot & Co.*, now pending here and reported *infra*.

The case of *Babcock, etc., v. L. S. & M. S. R. Co.*, 49 N. Y. 491, does not sustain the position of appellants' counsel. There the contract was only to deliver at Corry, the terminus of their line, etc. "Carriers not named in a contract for the carriage of goods, and who are not formal parties to it, may, under certain circumstances, have the benefit of it. Such is the case where the contract is made by one of several carriers on connecting lines on rates for the carriage of property over several routes for an agreed price, by authority express or *implied* of all the carriers. So, too, in the absence of any authority in advance, or any usage by which an authority may be inferred, a contract made by one carrier for the transportation of goods over his and connecting lines, adopted and acted upon by the other carriers, *will inure to the benefit of all*, thus ratifying it and performing service under it." *Ib.* p. 497, quoting 45 N. Y. 514, and 46 N. Y. 272.

The bill of lading expressly provides for *through transportation*, and guarantees the rate a large part of the way; defendant company took the goods under that contract, performed services under it, and is entitled to the benefit of all exceptions.

ENGLISH, C. J.—This action was brought in the Circuit Court of Jefferson county by E. L. Taylor & Co., merchants of Pine Bluff, against the Little Rock, Mississippi River & Texas Railway, for the value of fifty-one boxes of tobacco.

The substance of the complaint was, that plaintiffs, on the 20th of June, 1880, caused to be delivered to the defendant corporation, as a common carrier of goods, etc., at Arkansas City, fifty-one boxes of tobacco, more particularly set out in a bill of particulars attached, of the value of \$342.85, the property of plaintiffs, and the defendant then and there accepted and received said fifty-one boxes of tobacco of and from plaintiffs' authorized agents, to be safely and securely taken care of, and carried from Arkansas City to Pine Bluff, and there delivered to plaintiff, for a certain reasonable reward and compensation, to be paid to defendants; and defendant, in consideration thereof, undertook and promised to take care of said goods, and securely carry and deliver the same to plaintiffs at Pine Bluff; and although the defendant had and received said goods as aforesaid, yet defendant, not regarding its duty in that behalf, did nor would safely and securely keep and carry said goods; but, on the contrary, defendant, its agents and servants, so carelessly and negligently behaved and conducted themselves in the premises, that said goods were, on the day and year last aforesaid, at Arkansas City, wholly destroyed and lost to the plaintiffs, wherefore they pray judgment for \$400 damages, etc.

The bill of particulars, attached to the complaint, follows:

"20 boxes Air Line Twist tobacco, 500 lbs., 44c.	\$220 00
30 half-caddies Tit Bit tobacco, 310 lbs., 36c.	111 60
1 box Piedmont Beauty tobacco, 25 lbs., 45c.	11 25

"Total. \$342 85."

The defendant answered in two Code paragraphs. The first paragraph related to the first item in the bill of particulars, "twenty boxes Air Line Twist tobacco, 500 pounds, forty-four cents per pound, \$220," for the value of which, and interest, the plaintiffs obtained judgment, which, it seems, has been settled, and is not involved in this appeal.

The second paragraph of the answer related to the remaining items in the bill of particulars, as to which the verdict and judgment were for defendant, and is, in substance as follows:

"And as to said balance of said freight, being thirty-one boxes or packages, this defendant made no contract of shipment with plaintiffs, nor did it receive the said goods from the plaintiffs in any manner for any purpose; but the said goods were shipped from Lynchburg, Virginia, under a contract with the Atlantic, Mississippi & Ohio Railroad Company, to ship the same to plaintiff at Pine Bluff, Arkansas, for a stipulated rate of freight through, and received by the defendant, without any contract whatever with said shipping company from steamer "Vicksburg," and were stored in the depot, the wharf-boat "R. E. Lee," at Arkansas City, and accidentally burned by fire, and totally lost, without fault or negligence by this defendant, but by unavoidable accident; and this defendant only received the same to transport, as a connecting line, from said Arkansas City to Pine Bluff, Arkansas, under the shipping contract made with plaintiffs by said shipping company, in which contract of shipment it was expressly provided and stipulated, that said company should not be liable for loss or damage by fire while in depot; and said defendant says it was its universal custom, and known to plaintiff, that in shipping goods over its own line, to except all liability for loss or damage occurring by fire; and it received said goods under the terms of said shipping contract, and no other, and denies that it is liable for said loss. Said contract and bill of lading is filed herewith as *exhibit B*, as part of this answer. Defendant admits the value of said goods to be correctly stated."

On the trial the court permitted defendant, against the objection of plaintiffs, to read in evidence the following bill of lading, made exhibit B to second paragraph of answer:

"*Charles L. Perkins and Henry Fink, Receivers, No. 65, Atlantic, Mississippi & Ohio Railroad Company:*

"Received by the Atlantic, Mississippi & Ohio Railroad Com-

pany, from Smyth & Co., the following described packages in good apparent order (contents and value unknown), consigned as marked in the margin, to be transported over the line of their road to Bristol, and delivered in like good order, loss or damage by fire while in depot, breakage of glass, leakage of liquors and losses occurring from the perishable nature or inherent defects of property EXCEPTED, to the consignee or owner at said station, or to such company or carrier (if the same are to be forwarded beyond said station) whose line may be considered a part of the route to the place of destination of said goods or packages. It being distinctly understood that the responsibility of this company, as a common carrier, shall cease at the station when delivered to such owner, consignee or carrier. But it guarantees that the rate of freight for the transportation of said packages, from the place of shipment to Memphis, shall not exceed sixty-five cents per one hundred pounds, and legal charges advanced by this company. Dated at Lynchburg, Va., June 8, 1880. This receipt is subject to the rules and conditions of the printed local tariff of this company.

<i>Marks and Consignments</i>	<i>Articles.</i>	<i>Weights subject to correction.</i>
E. L. Taylor & Co. Pine Bluff, Ark., via Memphis, account Anchor Line. Marked C.	1 Box 80 Caddies Tobacco.	450

"T. D. JULES, Agent."

The plaintiffs' counsel admitted that the goods in controversy were shipped in Virginia under said bill of lading, but objected to the reading of it in evidence, because the defendant was not privy thereto, and could not claim the benefit of any exception or defence set out therein; but the court overruled the objection, and permitted the bill of lading to be read in evidence, and plaintiffs excepted, etc.

Plaintiffs' counsel then admitted that the goods in controversy were burned on a wharf-boat, which defendant was using as a depot at Arkansas City, after being received for transportation from the steamboat on the Mississippi River. The defendant then introduced two witnesses, who testified that the fire in the wharf-boat broke out accidentally on the 19th of June, 1880, and burned the boat and goods in controversy, and that defendant had good and careful men in charge of the boat at the time of the fire, who were exercising all diligence, and were careful in keeping the boat.

Defendant admitted the value of the goods as stated in the bill of particulars, and the above was all the evidence in the case.

As to the goods in the bill of lading, marked exhibit B, read in evidence, the court, of its own motion, charged the jury:

"1. In this case the plaintiffs are entitled to recover the value of the goods, unless the jury find that they were destroyed by fire at the depot without any negligence of the defendant or its agents.

"2. The burden of proof is on the defendant to show they were destroyed by fire at the depot, under circumstances that satisfy the minds of the jury that it was without negligence on the part of the defendant or its agents; or, in other words, that the goods were destroyed by fire whilst the defendant was using ordinary care in keeping them."

Defendant then asked and the court gave the following instruction:

"The railroad company was only required to take such ordinary care and diligence to protect the goods as is customary amongst prudent business men under like circumstances."

Plaintiff then asked the court to give the jury the following instructions:

"1. Ordinary care, as applied to common carriers, means such care as a reasonably prudent man takes of his own goods.

"2. If the fire in the wharf-boat broke out through the negligence of any of the servants or employes of defendant, this is considered the negligence of the defendant.

"3. A common carrier cannot, by contract, restrict its common law liabilities as an insurer of goods shipped over its line. [Refused.]

"4. Where there are several independent carriers forming a continuous line of transportation, any stipulation made by the first carrier, exempting all carriers of the line from their common law liability, for the destruction of goods by fire, will not inure to the benefit of the last carrier, when the first carrier does not guarantee a through rate of freight, and where it excludes itself from any liability whatever not occurring on its own line." [Refused.]

The court gave the first and second of these instructions, and refused the third and fourth, and plaintiff excepted, etc.

The court instructed the jury that, under the pleadings and admission of the parties, they would find in favor of plaintiffs for the value of the twenty boxes of tobacco embraced in a bill of lading read in evidence, but not above copied, covering the first items in the bill of particulars; and the jury so found; but found in favor of defendant as to the remaining items in the bill of particulars, covered by the bill of lading above copied.

Plaintiffs moved for a new trial, on the grounds:

1. That the court erred in refusing to exclude the bill of lading marked exhibit B.

2. In giving of its own motion the first two instructions, etc.

3. In refusing to give the third and fourth instructions asked for plaintiffs.

The court overruled the motion, and defendant took a bill of exceptions, etc.

Judgment was rendered in favor of plaintiffs for the value of the twenty boxes of tobacco, and interest, as found by the jury, and they appealed.

Whilst common carriers may contract against liability for losses, etc., occurring from unavoidable accidents, it is against public policy to permit them to contract for exemption from liability from losses and damages happening from the negligence of themselves or their servants. *Taylor, Cleveland & Co. v. Little Rock, Mississippi River and Texas R. R. Co.*, 32 Ark. 398, and authorities cited.

The court below did not err in refusing the *third* instruction moved for appellants.

So it is settled that a railroad corporation, in giving a bill of lading for the transportation of goods over its own line, and other connecting lines of railways, or other public means of carriage, may contract against liability for loss of or damage to goods happening beyond the termination of its own line, by unavoidable accidents. *Id.*

The court below, in admitting the bill of lading, and in refusing the *fourth* instruction moved for appellants, decided in effect that the clause in the bill of lading exempting the Atlantic, Mississippi and Ohio Railroad Company from liability for loss of the goods by fire while in depot, inured to the benefit of the appellee company.

The bill of lading was evidently made out by filling blanks in a printed form. It is to be inferred from its face that it was the purpose of Smyth & Co., the consignors, to send the tobacco from Lynchburg, Virginia, to Bristol by the railway of the company that gave the bill of lading, thence by connecting lines of railways to Memphis, thence by the Anchor line of steamboats to Arkansas City, and thence by the railway of appellee to the appellants, the consignees, at Pine Bluff. There is no contract expressed in the bill of lading that appellee, or any intermediate carrier, should be exempt from common law liability for loss of the goods by fire. The company that gave the bill of lading agreed to carry the goods from Lynchburg to Bristol, and deliver them, it may be assumed, to a carrier of a connecting line, and contracted for its own exemption from liability for loss or damage to the goods by fire while in depot. Beyond this it expressed no contract, except to guarantee that the rate of freight for the transportation of the goods from Lynchburg to *Memphis* should not exceed sixty-five cents per 100 pounds. There was no proof of any agreement between the shipping company and the owners of connecting lines,

for the transportation of goods on same common terms. We have nothing to guide us but the expressions in the bill of lading.

By the common law a common carrier is an insurer of goods which he undertakes to carry, except from loss by act of God or the public enemy. A contract to be exempt from responsibility from loss by fire, or other accident, like other contracts, must be upon some consideration. The consideration to the carrier is the exemption from responsibility, and the consideration to the owner of the goods is usually a reduced rate of freight. Hutchinson on Carriers, Sec. 278.

In this case there was no agreement in the bill of lading for a rate of freight beyond *Memphis*. The appellee was at liberty to charge a reasonable, customary rate for the transportation of the goods, in the absence of a showing to the contrary. The bill of lading fixed no rate for appellee. There is, therefore, an absence of any showing of any consideration to the owners of the goods for an implied contract on their part to exempt appellee from its common law liability for loss of the goods by fire.

Had the company which gave the bill of lading expressed in it a rate of freight to be charged by all the connecting lines to Pine Bluff, the destination of the goods, there would have been ground to hold, upon adjudicated cases, that its contract for exemption from liability for loss by fire inured to the benefit of the owners of all the connecting lines on the whole route, including appellee. Hutchinson on Carriers, Secs. 270, 278, and cases cited; *Maghee v. Camden & Amboy R. R. Co.*, 45 New York, 514; *Lamb et al. v. Camden & Amboy R. R. & T. Co.*, 46 *ib.* 272; *Babcock v. L. S. & M. S. Railway Co.*, 49 *ib.* 494; *Camden & Amboy Railroad Co. v. Forsyth Bros.*, 61 Penn. State, 81; *Jurson v. Camden & Amboy Railroad & T. Co.*, 4 American Law Register, 234.

Reversed, and remanded for a new trial.

Principal Case Considered.—The case above reported must be considered as settling the law in Arkansas to the effect that a common carrier may lawfully by express contract limit his liability, but that he cannot exempt himself from liability for the negligence of himself or his agents. Prior to this decision there had been no express adjudication on the point.

Contract Limiting Liability Enures to Protection of Connecting Lines.—Where goods are shipped over several connecting lines, and the bill of lading delivered by the first carrier contains a clause limiting liability, this will enure to the benefit of all the carriers on the line. *Railroad Co. v. Androscoggin Mills*, 22 Wall. 594; *Maghee v. Camden & Amboy R. Co.*, 45 N. Y. 514; *Manhattan Oil Co. v. Camden & Amboy R. Co.*, 54 N. Y. 196; *Lamb v. Camden & Amboy R. R. Co.*, 46 N. Y. 271; *Whitworth v. Erie R. Co.*, 6 Am. & Eng. R. R. Cas. 349; *Halliday v. St. Louis, etc., R. Co.*, 6 Am. & Eng. R. R. Cas. 488.

When Such Protection is Not Afforded.—But where the contract limiting liability is evidently solely for the benefit of the first carrier, as, for example, where he has contracted merely to transport to the end of his own line, and there deliver to the next succeeding carrier on the series, the clause limiting liability will not enure to the benefit of carriers other than the first

one. *Martin v. American Express Co.*, 19 Wisc. 336; *Merchants Dispatch Trans. Co. v. Bollos*, 80 Ill. 473; *Babcock v. Lake Shore & M. S. R. Co.*, 49 N. Y. 491; *Bancroft v. Merchants Dispatch Trans. Co.*, 47 Iowa, 262; *Camden & Amboy R. R. Co. v. Forsyth*, 61 Pa. St. 81; *Ætna Ins. Co. v. Wheeler*, 49 N. Y. 616.

Analogous Cases.—See *Little Rock M. R. & T. R. Co. v. Talbot & Co.*, and *Little Rock M. R. & T. R. Co. v. Corcoran*, reported, *infra*.

WEINBURG

v.

RAILROAD COMPANY.

(*Advance Case, North Carolina, November 25, 1884.*)

A stipulation in a bill of lading given by one of an associated through-line of common carriers, to the effect that if damage to the goods be sustained by the shipper, that company alone in whose custody the goods were at the time of the loss shall be answerable, is reasonable and binding.

Civil action tried on appeal from a Justice's judgment at Fall Term, 1883, of Edgecombe Superior Court, before Shepherd, J.

Upon the facts stated in the opinion here, and no evidence of defendant's negligence having been introduced, the court below held with the defendant, and gave judgment accordingly, from which the plaintiffs appealed.

John L. Bridgers, Jr., for plaintiff.

No counsel for defendant.

MERRIMON, J.—The plaintiff delivered to the defendant company a box of merchandise to be transferred over its railroad from Tarboro to Williamston, in this State, and thence by steamer to Baltimore, Md., and took from the defendants a bill of lading that contained the provision: "It is further stipulated and agreed that in case of any loss, detriment or damage to or sustained by any of the property herein receipted for during such transportation, whereby any legal liability or responsibility shall or may be incurred, that company shall alone be held answerable therefor in whose actual custody the same may be at the time of the happening of such loss, detriment or damage, and in such case that company shall have the benefit of any insurance effected by or on account of the owner or shipper of said goods." The goods were of the value of \$78, were duly transported by the defendant and delivered to the steamboat company at Williamston, and they were destroyed by fire while in the actual custody and care of the latter company. There is no allegation that the defendant was in default in any respect except as it might be liable on account of

the supposed negligence of the steamboat company. The railroad line and the steamboat line were distinct but connecting lines of transportation between Tarboro and Baltimore, and each in the course of business delivered freights to the other for transportation. This being the case, we are of the opinion that the plaintiff cannot hold the defendant liable for the loss sustained by him.

The bill of lading was evidence of a contract between the plaintiff and the defendant, and the former is bound by all the stipulations therein that were lawful and did not contravene public policy in respect to common carriers. The court held in *Phifer v. Railroad*, 89 N. C. 311, that a stipulation precisely like that stated above was reasonable, and did not contravene any rule of law or public policy, and was binding upon the shipper of goods or party to it. The Chief Justice delivered an elaborate opinion in that case, correctly expounding the law, and we see no reason to modify it in any respect. It is directly in point here, and the case must be governed by it.

The plaintiff's counsel relied in the argument upon the case of *Philips v. Railroad Co.*, 78 N. C. 294. That case might be applicable and in point, but for the stipulation in the bill of lading above set forth. If there had been no such stipulation, then the defendant might have been liable in case of negligence.

The view we have taken renders it unnecessary to advert to any other ground of error assigned in the record.

Affirmed.

LITTLE ROCK, MISSISSIPPI RIVER & TEXAS RAILWAY COMPANY

v.

TALBOT & Co.

(89 *Arkansas Reports*, 523.)

If the contract of a railroad company, as expressed in its bill of lading for shipping goods, leaves it in doubt whether the company was exempted from liability for loss happening by fire, the doubt must be resolved against the company.

Common carriers may contract for exemption from liability for injuries occurring from unavoidable accidents, but it is against public policy to allow them to contract against liabilities occurring from the negligence of themselves or their servants.

When, by contract, a common carrier is exempted from liability for loss occurring by fire, the owner of the goods lost in transit by fire must affirmatively prove that the loss was the result of negligence of the carrier or his agents before he can recover for it.

APPEAL from Jefferson Circuit Court.

M. L. Bell and *L. A. Pindall*, for appellants.

1. The instruction of the court to the effect that the exception in the bill of lading did not inure to the benefit of the appellant, the last carrier, was erroneous; it was merely a question of construction, and appellant, having accepted the freight and transported under the original contract of shipment, was clearly entitled to all the benefits of the contract.

2. A carrier can make exceptions to a certain class of liabilities. *Taylor, Cleveland & Co. v. R. R.*, 32 Ark. 393, and the burden of proof is on the plaintiff, where the loss occurs within the excepted clause. *R. R. Co. v. Reeves*, 10 Wall. 176; *Transportation Co. v. Doronen*, 11 Wall. 129; *Redfield on Railways*, p. 110, pars. 11 and 12.

ENGLISH, C. J.—John H. Talbot and John M. McCain, doing business under the firm name of John H. Talbot & Co., at Pine Bluff, brought this action in the circuit court of Jefferson county against the Little Rock, Mississippi River & Texas Railway Company, for the value of ninety-six sacks of corn, fifty-three sacks of oats, ten barrels of sugar, and thirteen packages, twenty-six buckets of manufactured tobacco, six hundred and thirty-seven pounds, all alleged to be of the value of \$692.25.

The substance of the complaint was, that the defendant received the goods, under three bills of lading, which are set out, at Arkansas City, for transportation to the plaintiffs at Pine Bluff, and that the goods were lost by the negligence of the defendant.

The substance of the answer was, that, in the bills of lading attached to the complaint, defendant was exempted from liability for the loss of the goods by fire, and that the goods were destroyed by fire by the burning of the wharf-boat *R. E. Lee*, its receiving depot, at Arkansas City, by unavoidable accident, and without fault or negligence of defendant.

The value of the whole of the goods, as stated in the complaint, was not controverted.

On the trial, the plaintiffs introduced the three bills of lading attached to the complaint, without objection.

The first, marked A, covered the ninety-six sacks of corn and fifty-three sacks of oats. It was a through bill of lading from St. Louis to Pine Bluff, dated the 13th of June, 1880, signed by an agent of the defendant company, and clearly contained an exemption of the company from liability for loss of the goods by fire.

The second bill of lading, marked B, covered the ten barrels of sugar, was a through bill of lading from New Orleans to Pine Bluff, dated the 17th of June, 1880, given by an agent of defendant, and also contained a clause of exemption from liability for loss of the goods by fire.

The third bill of lading, marked C, covered the tobacco, was

given at Richmond, Virginia, June 3, 1880, by the Richmond & Danville Railroad Company, and will be copied at length by the reporter. It contained a clause which defendant insisted exempted it from liability for loss of the goods by fire, but the court ruled otherwise.

It was admitted that the value of the tobacco covered by this bill of lading was \$267.22.

Plaintiffs introduced no further evidence.

E. W. Outlaw, witness for defendant, testified that all the goods named in the three bills of lading were received by defendant at Arkansas City, the terminus of defendant's railroad, on Saturday night, the 19th of June, 1880, on the wharf-boat R. E. Lee, which was the receiving depot of the road. That on Sunday morning, about six o'clock, the wharf-boat and contents were all burned, including the goods sued for. That the fire was accidental; and after careful investigation made by himself, who was the freight agent of the defendant, he could not ascertain the cause of the fire. It appeared to have broken out near the lamp room. Stanly Ryland, the clerk of the wharf-boat, had his office and bed-room on the wharf-boat, and slept there. The boat was fully manned with mate and watchmen, both night and day. It was moored about a quarter of a mile below the office of witness, where the bank was better and nearer the railroad track. At the time of the fire, Ryland, the clerk, was up at his breakfast. The day watchman was at the boat, having relieved the night watchman.

On cross-examination the witness said Mr. Star, the mate of the boat, was up in town when the fire occurred, and was not drunk; is now in Memphis, having been discharged, the company having no further use for his services after the boat was burned. He was a boatman by profession. The two watchmen are still in the employ of the company. The investigation showed the day watchman was on the stage-plank when the fire broke out. He was there, because he saved the books and papers out of the office. The boat cost the company \$6,500 at Memphis, and \$7,500 to tow her down. She was insured for \$6,000. The defendant had been recently offered \$10,000 for her. The freight was received on Saturday night from the steamers Vicksburg and Commonwealth, and was burned on Sunday morning.

This was all the evidence.

The jury, under instructions of the court, found a verdict in favor of plaintiffs for \$692.25 damages, being the value of all the goods embraced in the three bills of lading.

Defendant was refused a new trial, took a bill of exceptions, and appealed.

I. The court, of its own motion, instructed the jury (third instruction) that, as to the tobacco in the Virginia bill of lading, the plaintiffs were entitled to recover for its value.

In so charging the jury, the court decided as matter of law that the bills of lading did not exempt defendant from its common law liability as a common carrier for the value of goods destroyed by fire, which charge was excepted to, and the giving of it made ground of the motion for a new trial.

The clause in the Virginia bill of lading relied on by defendant as exempting it from responsibility for loss occasioned by fire follows: "It is further understood and agreed between the parties hereto that the railroad above mentioned, or any connecting railroad company, shall not be liable for any damages by fire or collision on the rivers and sea, or for loss or damage by storm or accident on water, as the Richmond & Danville and connecting railroads assume no marine risks whatever."

Looking at the whole bill of lading, we concur in the opinion of his honor, the circuit judge, that the clause quoted applies to loss by fire occurring on water, and not on the railways or in their depots. But if the proper construction of the clause be in doubt, the doubt must be resolved against defendant, because the burden was on it to show that it had clearly contracted for exemption from responsibility for loss happening by fire. Hutchinson on Carriers, Sec. 274.

II. The court, on its own motion, as to the goods embraced in the St. Louis & New Orleans bills of lading, instructed the jury:

"1. That plaintiffs were entitled to recover the value of the goods unless the jury find that they were destroyed by fire without negligence of the defendant or its agents.

"2. The burden of proof is on the defendant to show they were destroyed by fire under circumstances that satisfy the minds of the jury that it was without negligence on the part of defendant or its agents; or, in other words, that the goods were destroyed by fire whilst the defendant was using ordinary care in keeping them."

The first of these instructions is in harmony with the law that whilst common carriers may contract against liability for losses, etc., occurring from unavoidable accidents, as by fire, it is against public policy to permit them to contract for exemption from liability for losses and damages happening from the negligence of themselves or their servants. *Taylor & Co. v. Little Rock, Mississippi River & Texas Railway Company, supra.*

As to the second instruction, inasmuch as the St. Louis & New Orleans bills of lading introduced by plaintiffs exempted defendant from liability for loss of the goods by fire, it was sufficient for defendant to prove that the goods were destroyed by fire, and then the burden was upon plaintiff to prove that the loss resulted from the negligence of defendant or its agents. *Transportation Company v. Downer*, 11 Wallace, 133; *Clark et al v. Barnwell et al.*, 12 Howard, 272.

It was error in the court to give the instruction as framed.

III. Defendant moved three instructions, the first of which the court gave, and refused the other two.

The second assumed that by the Virginia bill of lading defendant was exempted from liability for loss of the tobacco by fire, if it happened without negligence on its part, and the instruction was properly refused, because the bill of lading did not contain such exemption.

The third was :

"Under the bills of lading exhibited with plaintiffs' complaint, the railroad was not liable for loss by fire, and if the goods were burned accidentally, the jury must find for defendant, unless the plaintiffs prove that the fire was caused by the negligence of defendant or its agents."

The instruction was properly refused, because it applied to all three of the bills of lading. Had it been confined to the St. Louis & New Orleans bills of lading, it should have been given.

For the error of the court above indicated, as to the burden of proof of negligence, the judgment must be reversed, and the cause remanded for a new trial.

See *Taylor & Co. v. Little Rock, M. R. & T. R. Co.*, *supra*, and *Little Rock, M. R. & T. Co. v. Corcoran*, and note *infra*.

LITTLE ROCK, MISS. RIVER & TEXAS R. R. Co.

v.

CORCORAN.

(40 *Arkansas Reports*, 875.)

When, by contract, a common carrier is exempted from liability for loss occurring by fire, the owner of goods lost by fire in the transit *must* affirmatively prove that the loss was the result of the negligence of the carrier or his agents, before he can recover.

APPEAL from Jefferson Circuit Court.

L. A. Pindall, for appellant.

ENGLISH, C. J.—James W. Corcoran brought this action in the Circuit Court of Jefferson county against the Little Rock, Mississippi River & Texas Railway Company for the value of goods alleged in the complaint to have been received by the defendant, as a common carrier, at Arkansas City, to be carried and be delivered to the plaintiff at Pine Bluff, under a bill of lading which exempted the defendant from liability for loss of or damage to the goods by fire, and which the complainant alleged were lost by the negligence of defendant.

The defendant answered that the goods were received, as stated in the complaint, on the wharf-boat R. E. Lee, at Arkansas City, which, at the time, was the receiving depot of defendant, at the terminus of its road on the Mississippi river, and that the same were burned by fire accidentally and without fault or neglect of defendant on or about the 20th day of June, 1880, and so by virtue of the contract of shipment set out in plaintiff's complaint, it being the only contract of shipment made with plaintiff, the defendant became released from all liability for the goods.

On the trial it was proved that the goods were lost by the burning of the wharf-boat R. E. Lee, used by defendant as a depot, and the evidence conduced to show that the fire was accidental, and without fault or negligence on the part of defendant or its agents in charge of the boat.

Defendant asked the court to instruct the jury that: "In this case the loss and damage by fire being excepted out of defendant's liability, if the defendant proved the goods were lost by fire, the burden of proof is on the plaintiff to show that the loss was caused by negligence."

This instruction the court refused, and in instructions given for plaintiff, ruled, in effect, that the burden was on defendant to prove want of negligence.

The jury returned a verdict in favor of plaintiff for the value of the goods; defendant moved for a new trial, which was refused, and it took a bill of exceptions and appealed from the final judgment.

In *Little Rock, Mississippi River & Texas Railway Co. v. Talbot & Co.*, 39 Ark. 523, s. c. *supra*, it was decided that when, by contract, a common carrier is exempted from liability for loss occurring by fire, the owner of the goods lost in transit by fire must affirmatively prove that the loss was the result of the negligence of the carrier or his agents before he can recover for it.

Reserved, and remanded for a new trial.

Contracts Limiting Liability Strictly Construed.—All contracts limiting liability are strictly construed against the carrier. *Edsall v. Railroad Co.*, 50 N. Y. 661; *St. Louis, etc., R. R. Co. v. Smuck*, 49 Ind. 302; *Atwood v. Transportation Co.*, 9 Watts, 87; *Union Mutual Ins. Co. v. Indianapolis, etc., R. R. Co.*, 1 Disney, 480; *Holsapple v. Rome, W. & O. R. R. Co.*, 8 Am. & Eng. R. R. Cas. 487; *Lindley v. Richmond, etc., R. R. Co.*, 9 Am. & Eng. R. R. Cas. 81; *New Orleans, etc., R. R. v. Faber et al.*, 9 Am. & Eng. R. R. Cas. 90; *Nicholas v. New York Central, etc., R. R. Co.*, 9 Am. & Eng. R. R. Cas. 103; *McKinney v. Jewett*, 9 Am. & Eng. R. R. Cas. 209.

Burden of Proving Negligence when Carrier's Liability is Limited by Contract.—Where there is a clause limiting the liability on the part of the carrier, and it appears that the loss has been occasioned by fire or some other cause within the exception, the burden is upon the plaintiff to prove negligence on the part of the carrier in causing the loss. *Transportation Co. v. Downer*, 11 Wall. 133; *Boskowitz v. Adams Ex. Co.*, 9 Cent. L. J. 389; *Cochran v. Dinsmore*, 49 N. Y. 249; *French v. Buffalo, etc., R. Co.*, 4 Kerzes (N. Y.), 108; *Whitworth v. Erie R. Co.*, 6 Am. & Eng. R. R. Cas. 349.

The burden of proof is, however, upon the carrier in the first instance to show that the cause of the loss was within the terms of the limitation. *Alabama, etc., R. Co. v. Little*, 12 Am. & Eng. R. R. Cas. 37.

And where the loss is unexplained, or the apparent cause of it is not of such a character as fails to give rise to any *prima facie* presumption of negligence, the burden of proof is on the carrier to disprove negligence. *Alabama, etc., R. Co. v. Little*, 12 Am. & Eng. R. R. Cas. 37; *Rintoul v. New York C. & H. R. R. Co.*, 16 Am. & Eng. R. R. Cas. 144.

When the facts show that the cause of the loss is such as might or might not have been occasioned by the carrier's negligence, the question is for the jury. *Canfield et al. v. Baltimore & Ohio R. R. Co.*, 16 Am. & Eng. R. R. Cas. 152.

HART

v.

PENNSYLVANIA RAILROAD CO.

(112 *United States Reports*, 831.)

Where a contract of carriage, signed by the shipper, is fairly made with a railroad company, agreeing on a valuation of the property carried, with the rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, even in case of loss or damage by the negligence of the carrier, the contract will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuations.

H. shipped five horses, and other property, by a railroad, in one car, under a bill of lading, signed by him, which stated that the horses were to be transported "upon the following terms and conditions, which are admitted and accepted by me as just and reasonable: *First*, to pay freight thereon" at a rate specified, "on the condition that the carrier assumes a liability on the stock to the extent of the following agreed valuation: If horses or mules, not exceeding \$200 each. * * * If a chartered car, on the stock and contents in same, \$1,200 for the car-load. But no carrier shall be liable for the acts of the animals themselves. * * * nor for loss or damage arising from condition of the animals themselves, which risks, being beyond the control of the company, are hereby assumed by the owner, and the carrier released therefrom. By the negligence of the railroad company or its servants, one of the horses was killed and the others were injured, and the other property was lost. In a suit to recover the damages, it appeared that the horses were race-horses, and the plaintiff offered to show damages, based on their value, amounting to over \$25,000. The testimony was excluded, and he had a verdict for \$1,200. On a writ of error, brought by him, *held*. (1) the evidence was not admissible, and the valuation and limitation of liability in the bill of lading was just and reasonable, and binding on the plaintiff; (2) the terms of the limitation covered a loss through negligence.

In Error to the Circuit Court of the United States for the Eastern District of Missouri.

Melville C. Day and *G. M. Stewart*, for plaintiff in error.

E. W. Pattison and *Newton Crane*, for defendant in error.

BLATCHFORD, J.—Lawrence Hart brought this suit in a State court in Missouri against the Pennsylvania Railroad Company, to recover damages from it, as a common carrier, for the breach of a contract to transport, from Jersey City to St. Louis, five horses and other property. The petition alleges that, by the negligence of the defendant, one of the horses was killed and the others were injured, and the other property was destroyed, and claims damages to the amount of \$19,800. After an answer and a reply, the plaintiff removed the suit into the circuit court of the United States for the eastern district of Missouri, where it was tried by a jury, who found a verdict of \$1,200 for the plaintiff, and, after a judgment accordingly, the plaintiff has brought this writ of error. The property was transported under a bill of lading issued by the defendant to the plaintiff, and signed by him, and reading as follows:

“BILL OF LADING.

“Form No. 39, N. J.

“*Limited Liability Live-Stock Contract for United Railroads of New Jersey Division.* (No. 206.)

“JERSEY CITY STATION, P. R. R., ———, 187—.

“Lawrence Hart delivered into safe and suitable cars of the Pennsylvania Railroad Company, numbered M. L. 224, for transportation from Jersey City to St. Louis, Mo., live-stock, of the kind, as follows: one (1) car, five horses, shipper's count; which has been received by said company, for themselves and on behalf of connecting carriers, for transportation, upon the following terms and conditions, which are admitted and accepted by me as just and reasonable:

“*First.* To pay the freight thereon to said company at the rate of ninety-four (94) cents per one hundred pounds (company's weight), and all back freight and charges paid by them, on the condition that the carrier assumes a liability on the stock to the extent of the following agreed valuation: If horses or mules, not exceeding two hundred dollars each; if cattle or cows, not exceeding seventy-five dollars each; if fat hogs or fat calves, not exceeding fifteen dollars each; if sheep, lambs, stock hogs, or stock calves, not exceeding five dollars each; if a chartered car, on the stock and contents in same, twelve hundred dollars for the car-load. But no carrier shall be liable for the acts of the animals themselves, or to each other, such as biting, kicking, goring and smothering, nor for loss or damage arising from condition of the animals themselves, which risks, being beyond the control of the company, are hereby assumed by the owner, and the carrier released therefrom.

“*Second.* Upon the arrival of the cars or boats containing said stock at point of destination, the shipper, owner, or consignee shall forthwith pay said freights and charges, and receive said stock

therein and unload the same therefrom; and if, from any cause, he or they shall fail or refuse to pay, receive, or unload, as aforesaid, then said company or other carrier, as the agent of said shipper, owner, or consignee, may thereupon have them put and provided for in some suitable place, at the cost and risk of such shipper, owner, or consignee, and at any time or times thereafter may sell the same, or any number of them, at public or private sale, with or without notice, as said agent may deem necessary or expedient, and apply the proceeds arising therefrom, or so much as may be needed, to the payment of such freight and charges, and other necessary and proper costs and expenses.

“Third. When necessary for said stock to be transported over the line or lines of any other carrier or carriers to the point of destination, delivery of the said stock may be made to such other carrier or carriers for transportation, upon such terms and conditions as the carrier may be willing to accept: provided, that the terms and conditions of this bill of lading shall inure to such carrier or carriers, unless they shall otherwise stipulate; but in no event shall one carrier be liable for the negligence of another.

“Fourth. All live-stock transported under this contract shall be subject to a lien, and may be retained and sold for all freight or charges due for transportation on live-stock or property transported for the same owner, shipper or consignee.

“Fifth. This company's liability is limited to the transportation of said animals, and shall not begin until they shall be loaded on board the boats or cars of the company. The owner of said animals, or some person appointed by him, shall go with, and take all requisite care of, the said animals during their transportation and delivery, and any omission to comply therewith shall be at the owner's risk. Witness my hand and seal, this twentieth day of October, 1879.

LAWRENCE HART, Shipper. [L. s.]

“Attest:

“E. BUTTER.

“W. J. CHARMERS, Company's Agent.”

At the trial the plaintiff put in evidence the bill of lading, and gave testimony to prove the alleged negligence, and how the loss and injury occurred. He then offered to show that the actual value of the horse killed was \$15,000; that the other horses were worth from \$3,000 to \$3,500 each; and that they were rendered comparatively worthless in consequence of their injuries. The defendant objected to this testimony, on the ground that it was not competent for the plaintiff to prove any damage or loss in excess of that set out in the bill of lading. The court sustained the objection, and the plaintiff excepted. It appeared on the trial that the horses were race-horses, and that they and the other property were all in one car. It was admitted by the defendant that the damages sustained by the plaintiff were equal to the full amount expressed

in the bill of lading. The court charged the jury as follows: "It is competent for a shipper, by entering into a written contract, to stipulate the value of his property, and to limit the amount of his recovery in case it is lost. This is the plain agreement that the recovery shall not exceed the sum of \$200 each for the horses, or \$1,200 for a car-load. It is admitted here by counsel for the defendant, under this charge, that the plaintiff is entitled to recover a verdict for \$1,200, and also, under the charge of the court, the plaintiff agrees that that is all. It is simply your duty to find a verdict for that amount." The plaintiff excepted to this charge. The errors assigned are that the court erred in refusing to permit the plaintiff to show the actual damages he had sustained, and in so charging the jury as to restrict their verdict to \$1,200.

It is contended for the plaintiff that the bill of lading does not purport to limit the liability of the defendant to the amounts stated in it, in the event of loss through the negligence of the defendant. But we are of opinion that the contract is not susceptible of that construction. The defendant receives the property for transportation on the terms and conditions expressed, which the plaintiff accepts "as just and reasonable." The first paragraph of the contract is that the plaintiff is to pay the rate of freight expressed, "on the condition that the carrier assumes a liability on the stock to the extent of the following agreed valuation: If horses or mules, not exceeding \$200 each; * * * if a chartered car, on the stock and contents in same, \$1,200 for the car-load." Then follow, in the first paragraph, these words: "But no carrier shall be liable for the acts of the animals themselves, or to each other, such as biting, kicking, goring, or smothering, nor for loss or damage arising from condition of the animals themselves, which risks, being beyond the control of the company, are hereby assumed by the owner, and the carrier released therefrom." This statement of the fact that the risks from the acts and condition of the horses are risks beyond the control of the defendant, and are therefore assumed by the plaintiff, shows, if more were needed than the other language of the contract, that the risks and liability assumed by the defendant in the remainder of the same paragraph are those not beyond but within the control of the defendant, and therefore apply to loss through the negligence of the defendant. It must be presumed from the terms of the bill of lading, and without any evidence on the subject, and especially in the absence of any evidence to the contrary, that, as the rate of freight expressed is stated to be on the condition that the defendant assumes a liability to the extent of the agreed valuation named, the rate of freight is graduated by the valuation. Especially is this so, as the bill of lading is what its heading states it to be, "a limited liability live-stock contract," and is confined to live-stock. Although the horses, being race-horses, may, aside from the bill

of lading, have been of greater real value than that specified in it, whatever passed between the parties before the bill of lading was signed, was merged in the valuation it fixed; and it is not asserted that the plaintiff named any value, greater or less, otherwise than as he assented to the value named in the bill of lading, by signing it. The presumption is conclusive, that if the liability had been assumed on a valuation as great as that now alleged, a higher rate of freight would have been charged. The rate of freight is indissolubly bound up with the valuation. If the rate of freight named was the only one offered by the defendant, it was because it was a rate measured by the valuation expressed. If the valuation was fixed at that expressed, when the real value was larger, it was because the rate of freight named was measured by the low valuation. The plaintiff cannot claim a higher valuation on the agreed rate of freight.

It is further contended by the plaintiff that the defendant was forbidden, by public policy, to fix a limit for its liability for a loss by negligence at an amount less than the actual loss by such negligence. As a minor proposition, a distinction is sought to be drawn between a case where a shipper, on requirement, states the value of the property, and a rate of freight is fixed accordingly, and the present case. It is said that, while in the former case the shipper may be confined to the value he so fixed, in the event of a loss by negligence, the same rule does not apply to a case where the valuation inserted in the contract is not a valuation previously named by the shipper. But we see no sound reason for this distinction. The valuation named was the "agreed valuation," the one on which the minds of the parties met, however it came to be fixed, and the rate of freight was based on that valuation, and was fixed on condition that such was the valuation, and that the liability should go to that extent and no further. We are, therefore, brought back to the main question. It is the law of this court that a common carrier may, by special contract, limit his common law liability; but that he cannot stipulate for exemption from the consequences of his own negligence or that of his servants. *New Jersey Steam Nav. Co. v. Merchants Bank*, 6 How. 344; *York Co. v. Central R. R.*, 3 Wall. 107; *Railroad Co. v. Lockwood*, 17 Wall. 357; *Express Co. v. Caldwell*, 21 Wall. 264; *Railroad Co. v. Pratt*, 22 Wall. 123; *Bank of Kentucky v. Adams Exp. Co.*, 93 U. S. 174; *Railway Co. v. Stevens*, 95 U. S. 655.

In *York Co. v. Central R. R.* 3 Wall. 107, a contract was upheld exempting a carrier from liability for loss by fire, the fire not having occurred through any want of due care on his part. The court said that a common carrier may "prescribe regulations to protect himself against imposition and fraud, and fix a rate of charges proportionate to the magnitude of the risks he may have to encounter." In *Railroad Co. v. Lockwood*, 17 Wall. 357, the fol-

lowing propositions were laid down by this court: (1) A common carrier cannot lawfully stipulate for exemption from responsibility when such exemption is not just and reasonable in the eye of the law. (2) It is not just and reasonable in the eye of the law for a common carrier to stipulate for exemption from responsibility for the negligence of himself or his servants. (3) These rules apply both to carriers of goods and to carriers of passengers for hire, and with special force to the latter. The basis of the decision was that the exemption was to have applied to it the test of its justness and reasonable character. It was said that the contracts of the carrier "must rest upon their fairness and reasonableness," and that it was just and reasonable that carriers should not be responsible for losses happening by sheer accident, or chargeable for valuable articles liable to be damaged, unless apprised of their character or value. That case was one of a drover traveling on a stock train on a railroad to look after his cattle, and having a free pass for that purpose, who had signed an agreement taking all risk of injury to his cattle and of personal injury to himself, and who was injured by the negligence of the railroad company or its servants. In *Express Co. v. Caldwell*, 21 Wall. 264, this court held that an agreement made by an express company, a common carrier in the habit of carrying small packages, that it should not be held liable for any loss or damage to a package delivered to it, unless claim should be made therefor within ninety days from its delivery to the company, was an agreement which the company could rightfully make. The court said: "It is now the settled law that the responsibility of a common carrier may be limited by an express agreement made with his employer at the time of his accepting goods for transportation, provided the limitation be such as the law can recognize as reasonable, and not inconsistent with sound public policy." It was held that the stipulation as to the time of making a claim was reasonable and intrinsically just, and could not be regarded as a stipulation for exemption from responsibility for negligence, because it did not relieve the carrier from any obligation to exercise diligence, fidelity and care.

On the other hand, in *Bank of Kentucky v. Adams Exp. Co.*, 93 U. S. 174, it was held that a stipulation by an express company that it should not be liable for loss by fire could not be reasonably construed as exempting it from liability from loss by fire occurring through the negligence of a railroad company which it had employed as a carrier. To the views announced in these cases we adhere; but there is not in them any adjudication on the particular question now before us. It may, however, be disposed of on principles which are well established, and which do not conflict with any of the rulings of this court. As a general rule, and in the absence of fraud or imposition, a common carrier is answerable for the loss of a package of goods, though he is ignorant of

its contents, and though its contents are ever so valuable, if he does not make a special acceptance. This is reasonable, because he can always guard himself by a special acceptance, or by insisting on being informed of the nature and value of the articles before receiving them. If the shipper is guilty of fraud or imposition, by misrepresenting the nature or value of the articles, he destroys his claim to indemnity, because he has attempted to deprive the carrier of the right to be compensated in proportion to the value of the articles and the consequent risk assumed, and what he has done has tended to lessen the vigilance the carrier would otherwise have bestowed. 2 Kent, Comm. 603, and cases cited; *Relf v. Rapp*, 3 Watts & S. 21; *Dunlap v. Steamboat Co.*, 98 Mass. 371; *Railroad Co. v. Fraloff*, 100 U. S. 24. This qualification of the liability of the carrier is reasonable, and is as important as the rule which it qualifies. There is no justice in allowing the shipper to be paid a large value for an article which he has induced the carrier to take at a low rate of freight on the assertion and agreement that its value is a less sum than that claimed after a loss. It is just to hold the shipper to his agreement, fairly made, as to value, even where the loss or injury has occurred through the negligence of the carrier. The effect of the agreement is to cheapen the freight and secure the carriage, if there is no loss; and the effect of disregarding the agreement, after a loss, is to expose the carrier to a greater risk than the parties intended he should assume. The agreement as to value, in this case, stands as if the carrier had asked the value of the horses, and had been told by the plaintiff the sum inserted in the contract.

The limitation as to value has no tendency to exempt from liability for negligence. It does not induce want of care. It exacts from the carrier the *mesuré* of care due to the value agreed on. The carrier is bound to respond in that value for negligence. The compensation for carriage is based on that value. The shipper is estopped from saying that the value is greater. The articles have no greater value for the purposes of the contract of transportation between the parties to that contract. The carrier must respond for negligence up to that value. It is just and reasonable that such a contract, fairly entered into, and where there is no deceit practiced on the shipper, should be upheld. There is no violation of public policy. On the contrary, it would be unjust and unreasonable, and would be repugnant to the soundest principles of fair dealing and of the freedom of contracting, and thus in conflict with public policy, if a shipper should be allowed to reap the benefit of the contract if there is no loss, and to repudiate it in case of loss. This principal is not a new one. In *Gibbon v. Paynton*, 4 Burr, 2298, the sum of £100 was hidden in some hay in an old nail-bag and sent by a coach and lost. The plaintiff knew of a

notice by the proprietor that he would not be answerable for money unless he knew what it was, but did not apprise the proprietor that there was money in the bag. The defence was upheld, Lord Mansfield saying: "A common carrier, in respect of the premium he is to receive, runs the risk of the goods and must make good the loss, though it happen without any fault in him, the reward making him answerable for their safe delivery. His warranty and insurance is in respect of the reward he is to receive, and the reward ought to be proportionable to the risk. If he makes a greater warranty and insurance, he will take greater care, use more caution, and be at the expense of more guards or other methods of security, and therefore he ought, in reason and justice, to have a greater reward. To the same effect is *Batson v. Donovan*, 4 Barn. & Ald. 21.

The subject-matter of a contract may be valued, or the damages in case of a breach may be liquidated, in advance. In the present case, the plaintiff accepted the valuation as "just and reasonable." The bill of lading did not contain a valuation of all animals at a fixed sum for each, but a graduated valuation according to the nature of the animal. It does not appear that an unreasonable price would have been charged for a higher valuation. The decisions in this country are at variance. The rule which we regard as the proper one in the case at bar is supported in *Newberger v. Howard*, 6 Phila. 174; *Squire v. New York Cent. R. Co.*, 98 Mass. 239; *Hopkins v. Westcott*, 6 Blatchf. 64; *Belger v. Dinsmore*, 51 N. Y. 166; *Oppenheimer v. U. S. Exp. Co.*, 69 Ill. 62; *Magnin v. Dinsmore*, 56 N. Y. 168, and 62 N. Y. 35, and 70 N. Y. 410; *Earnest v. Express Co.*, 1 Woods, 573; *Elkins v. Empire Transportation Co.*, 81* Pa. St. 315; *South & North Ala. R. Co. v. Henlein*, 52 Ala. 606; *Same v. Same*, 56 Ala. 368; *Muser v. Holland*, 17 Blatchf. 412; *Harvey v. Terre Haute R. Co.*, 74 Mo. 538; s. c. 6 Am. & Eng. R. R. Cas. 293; and *Graves v. Lake Shore Ry. Co.*, 137 Mass. 33; s. c. 16 Am. & Eng. R. R. Cas. 108. The contrary rule is sustained in *Southern Exp. Co. v. Moon*, 39 Miss. 822; *The City of Norwich*, 4 Ben. 271; *U. S. Exp. Co. v. Backman*, 28 Ohio St. 144; *Black v. Goodrich Transp. Co.*, 55 Wis. 319; *Chicago, St. L. & N. O. R. Co. v. Abels*, 60 Miss. 1017; *Kansas City R. Co. v. Simpson*, 30 Kan. 645; s. c. 16 Am. & Eng. R. R. Cas. 158; and *Moulton v. St. Paul, etc., R. Co.*, 31 Minn. 85; s. c. 12 Am. & Eng. R. R. Cas. 13. We have given consideration to the views taken in these latter cases, but are unable to concur in their conclusions. Applying to the case in hand the proper test to be applied to every limitation of the common law liability of a carrier—its just and reasonable character—we have reached the result indicated. In Great Britain, a statute directs this test to be applied by the courts. The same rule is the proper one to be applied in this country, in the absence of any statute.

As relating to the question of the exemption of a carrier from liability beyond a declared value, reference may be made to Sec. 4281 of the Revised Statutes of the United States (a re-enactment of Sec. 69 of the act of February 28, 1871, c. 100, 16 St. 458), which provides that if any shipper of certain enumerated articles, which are generally articles of large value in small bulk, "shall lade the same, as freight or baggage, on any vessel, without, at the time of such lading, giving to the master, clerk, agent, or owner of such vessel receiving the same, a written notice of the true character and value thereof, and having the same entered on the bill of lading therefor, the master and owner of such vessel shall not be liable as carriers thereof in any form or manner, nor shall any such master or owner be liable for any such goods beyond the value and according to the character thereof so notified and entered." The principle of this statute is in harmony with the decision at which we have arrived.

The plaintiff did not, in the course of the trial, or by any request to instruct the jury, or by any exception to the charge, raise the point that he did not fully understand the terms of the bill of lading, or that he was induced to sign it by any fraud or under any misapprehension. On the contrary, he offered and read in evidence the bill of lading as evidence of the contract on which he sued. The distinct ground of our decision in the case at bar is that, where a contract of the kind, signed by the shipper, is fairly made, agreeing, on a valuation of the property carried, with the rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, even in case of loss or damage by the negligence of the carrier, the contract will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuations. *Squire v. New York Cent. R. Co.*, 98 Mass. 239, 245, and cases there cited.

There was no error in excluding the evidence offered, or in the charge to the jury, and the judgment of the circuit court is affirmed.

Clause in Bill of Lading Limiting Company's Liability Does Not Apply in Case of Negligence.—There are many authorities to the effect that a clause in a bill of lading limiting the amount of a common carrier's liability has no application where a loss is occasioned by the company's negligence. In such case it is held that there may be a recovery for the entire loss. *Westcott et al. v. Fargo*, 61 N. Y. 542; *United States Express Co. v. Backman*, 28 Ohio St. 144; *Orndorff & Co. v. Adams Express Co.*, 3 Bush. (Ky.) 194; *Kirby v. Adams Express Co.*, 2 Mo. App. 369; *Mobile & Ohio R. R. Co. v. Hopkins*, 41 Ala. 486; *American Express Co. v. Sands*, 55 Pa. St. 140; *Adams Express Co. v. Stettanus*, 61 Ill. 184; *Lamb v. Camden & Amboy R. & T. Co.*, 46 N. Y. 271; *Judson v. Western R. Corp.*, 6 Allen 486; *Chicago, etc., R. Co. v. Abels*, 60 Miss. 1017; *Morrison v. Construction Co.*, 44 Wisc. 405; *The steamboat "City of Norwich,"* 4 Ben. 271; *Black v. Goodrich Trans.*

Co., 55 Wisc. 819; *Southern Express Co. v. Moon*, 39 Miss. 822; *Moulton v. St. Paul, M. & M. R. Co.*, 12 Am. & Eng. R. R. Cas. 13; *Kansas City, St. J. & C. B. R. Co. v. Simpson*, 16 Am. & Eng. R. R. Cas. 158.

When Company Limits Liability and Value is Not Given by Shipper, Company is Not Liable in any Event Except for Limited Amount.—When, by the terms of the bill of lading, the railroad company limits its liability to a certain sum, and a shipper sending goods fails to give information to the effect that they are worth more, and accepts the bill of lading, he is, according to some authorities, not entitled to recover a larger amount than the sum specified therein, even in the event of the carrier's negligence. *Belger v. Dinsmore*, 51 N. Y. 166; *Earnest v. Express Co.*, 1 Woods 573; *Magnin v. Dinsmore*, 70 N. Y. 410; *Kirkland v. Dinsmore*, 62 N. Y. 45; *Muser v. American Express Co.*, 1 Fed. Rep. 382; *Hopkins v. Westcott*, 6 Blatchf. 64.

Liability When Goods are Shipped at Fixed Valuation.—When the goods are transported at a fixed valuation, this will control in any event. *Elkins v. Transportation Co.*, 81 Pa. St. 315; *Harvey v. Terre Haute & Indianapolis R. Co.*, 74 Mo. 538; s. c. 6 Am. & Eng. R. R. Cas. 293; *Graves v. Lake Shore & Mich. S. R. Co.*, 16 Am. & Eng. R. R. Cas. 108.

But it has been held that even the transportation of goods at an agreed valuation, if it can be construed into a simple agreement limiting the liability of the carrier, will have no application when goods are lost through the carrier's negligence. *Black v. Goodrich Trans. Co.*, 55 Wisc. 819.

GULF, COLORADO & SANTA FE RAILROAD CO. .

v.

MAETZE.

(*Advance Case, Texas, February 21, 1885.*)

See petition in suit against a railroad company for failure to deliver part of a cotton press, which does not allege facts entitling plaintiff to recover for any other damages than the reasonable cost of replacing the missing part, and the fair rental value of the press during the delay in its operation, caused by the company's failure, with legal interest thereon.

Where the goods are not intended for sale in the market of destination, but to serve some specific purpose of the owner, in the absence of special circumstances making the carrier liable for special loss, or the expense to which the owner is put by the company's negligent delay, the measure of damages is the actual inconvenience of the owner being deprived of the use of his property during the delay. See how this is determined.

To entitle the consignor to other damages than are the natural consequence of the delay, or which could not have been anticipated by the parties at the time of shipment, he must aver them in his petition.

The provision in a contract of shipment as to notice of a claim for damages being given within a specified time, or the consignor is precluded from a recovery, while valid and binding in contracts to be partly performed without the State, is not valid nor binding where the contract is to be wholly performed within the State.

When the company receives freight defectively addressed, it waives any rights to plead such defect when it fails to deliver same as contracted.

Where, by reason of a failure to deliver goods in a reasonable time, the consignor is compelled to and does purchase other goods, he is not compelled to receive such goods when offered at another time.

APPEAL from Austin county.

Chessley & Haggarty, for appellant.

No appearance for appellee.

WILLSON, J.—Appellee owned a steam cotton gin, and desiring to attach thereto a cotton press, he purchased one consisting of several pieces, and had the same shipped to him from New Orleans to Belleville, a part of the route being over appellant's line of railway. Appellant received the freight at Houston, and transported it to its depot at Belleville without delay, except one piece thereof—a sill—which did not arrive at the depot with the other pieces. On July 10, 1883, appellee demanded and received his freight, with the exception of said sill, the loss of which was not discovered until then, though the freight had been at the depot since June 16. Upon discovering the loss of this piece, appellee immediately notified appellant's agent at Belleville, and he at once sent out a line tracer in search of it, and found and had it brought to Belleville September 1, and tendered the same to appellee, who refused to receive it. On July 20 appellee ordered another sill from New Orleans, which he received on August 14, 1883, and he then started his press to work. The last sill is still at appellant's depot at Belleville, subject to appellee's order. Appellee brought this suit to recover of appellant the value of the lost sill (\$35), and \$600 damages for delay in failing to deliver the same within a reasonable time. He claims as damages the profits on the ginning of 200 bales of cotton at three dollars per bale, which he alleges he lost by reason of the premises. No other damages are alleged or claimed in his petition. Appellant excepted specially to the damages claimed because the same are uncertain, remote and speculative, and because appellant was not notified that it was important to appellee that the freight should be forwarded without delay. This exception was overruled, and upon trial by jury there was a verdict for appellee for \$100, the *rental value* of the press, and for \$35, the value of the sill, and judgment was rendered accordingly.

We think the court erred in overruling the above mentioned special exception to appellee's petition. No facts are alleged in said petition which entitle appellee to recover any other damages than the reasonable cost of replacing the missing sill, and the fair rental value of the press during the delay in the operation thereof, caused by the failure of appellant to deliver the sill, with legal interest thereon. Applicable to a case like this, the ordinary measure of damages is thus stated: "Where the goods are not intended for sale in the market of destination, but are intended to serve some specific purpose of the owner, * * * in the absence of special circumstances which may make the carrier liable for some special loss, or for the expense to which the owner may be put by his negligent delay, he could be held liable only for the inconvenience to which the owner had been put by being deprived of the use of his property during the term of delay, which must be determined as a question of fact by the jury, by ascertaining from the evidence the value of its use, the criterion of which would be, in

most cases, its rental value during the delay ; or, in case of an absolute refusal to transport according to contract, for such time as would be requisite to obtain the article by another conveyance, or from some other source." Hutch. on Carriers, Sec. 776 ; 3 Sutherland on Dam., 215 ; W. & W.'s Con. Rep., Secs. 206, 814 ; 2 Con. Rep., Secs. 404, 405.

In order to entitle appellee to special damages, which are not the natural consequence of the delay, or which could not have been reasonably anticipated by the parties when the shipment was made, he must have averred them in his petition. 2 Green. on Ev., Sec. 254 ; Sedgw. on Dam., 575 ; 3 Sutherland on Dam., 228 *et seq.* ; 2 Con. Rep., Sec. 405.

Under the averments in the petition, the damages claimed were not recoverable except the \$35, the alleged cost of replacing the missing sill. If appellee had alleged special damages by loss of profits, and the facts which would make such damages recoverable, his claim therefor would be maintainable, but having failed to do this, his claim for such damages was bad, and should have been disallowed on special exception thereto.

Appellee having claimed damages not allowable by law, having failed to allege and claim the rental value of the property during the delay, he was not entitled to prove and recover such rental value, or any other damages not claimed in his petition. It was error, therefore, to admit the testimony offered by appellee, and objected to by appellant, to prove the rental value, and error for the court to submit to the jury, in its charge, the rental value as the measure of damages, and the verdict and judgment for such damages are not warranted by the pleadings. "A judgment which does not conform to the pleadings, but goes outside thereof, and determines issues and grants relief not presented or prayed for in the pleadings, is erroneous, and will be set aside on appeal." W. & W.'s Con. Rep., Secs. 131, 195, 514, 581, 871, 875 ; 2 Con. Rep., Sec. 314.

Appellant, among other defences, pleaded that by the terms of the contract of shipment, it was stipulated that all damages for loss of freight should be considered as waived by appellee, if not made in writing to appellant within three days after delivery of the freight to appellee, and that no such demand had been made by appellee. This defence was specially excepted to by appellee, upon the ground that such a provision in a contract of shipment is not valid under the statute of this State. The exception was sustained, and this action of the court is assigned as error. By our statute, carriers for hire within this State cannot limit their liability as it exists at common law. Rev. Stat., Art. 273. It has been held in the case of the shipment of stock, that a stipulation in the contract of shipment, making it a condition precedent to the shipper's right to recover damages that he should first give notice in writing

of his claim for damages to the carrier before removing the stock from the place of delivery, etc., was a valid, legal and binding condition. W. & W.'s Con. Rep., Secs. 374, 1260, 1264; G., H. & S. A. R. R. v. Harmon, 2 Texas Law Review, 216; T. & P. R. R. v. Davis, 2 Texas Law Review, 179. But the cases in which it has been so held were cases where the contract of carriage was not to be wholly performed within the State, but was to be partly performed beyond the limits of this State. In such cases the statute does not apply. W. & W.'s Con. Rep., Secs. 335, 1260. In the case before us the contract of carriage was to be wholly performed by appellant within this State, and, the said stipulation being limitation upon its common law, liability as a carrier was within the inhibition of the statute, and therefore not valid and binding. There was no error in sustaining appellee's special exception to said plea.

The lost sill was marked with the name of appellee when it was shipped from New Orleans, but the place of its destination was not marked upon it. It is contended by appellant that the failure to properly mark the sill was contributory negligence on the part of appellee, which bars his recovery in this action. We think otherwise. Even if it could be held to be appellee's fault that the sill was not properly marked, still, the appellant cannot be heard to complain thereof, because it received the freight in that condition, and thereby waived any defect in the manner in which it was marked or directed.

In view of another trial, we will say the rental value of the property delayed should be estimated with reference to the circumstances of the case; that is, it would be proper to take into consideration that there was a gin adjacent; that it was the season of the year for ginning cotton; the proximity or remoteness of other gins and presses; the amount of cotton likely to be brought to appellee's gin, and such other facts as would aid in ascertaining the reasonable rental value of appellee's press during the period of the delay, had it then been in a condition to be operated. In proof of such value the opinion of witnesses acquainted with the press, and with the facts bearing upon the value of its use, would be competent evidence. 1 Sutherland on Dam., 798; 2 *Idem.*, 375; 3 *Idem.*, 111, 112. If there was a market rental value, such value would control, but if there was no market, the value may be ascertained by proof of such elements, or facts, affecting the question as may exist, and by the opinions of witnesses properly informed on the subject. 2 Sutherland on Dam., 377, 378. The charge of the court upon this subject is substantially correct, but was not authorized by the pleadings.

Appellee was not bound to receive the sill when tendered to him after it had been found and brought to Belleville. By reason of the delay in its delivery it had become useless to him, he having

been compelled to replace it by another, and, detached, as it was, from the press, it was comparatively valueless. He was entitled to recover its value at the time and place it should have been delivered to him, with interest thereon. *Hutch. on Car.*, Sec. 328; 2 *Con. Rep.*, Sec. 342.

Because the verdict and judgment are not warranted by the pleadings of appellee, the judgment is reversed, and the cause is remanded.

Reversed and remanded.

Liability of Railroad Company for Special Injuries Caused by Failure to Deliver Goods.—When a railroad company fails to deliver goods committed to it for transportation, or makes an undue delay in the delivery of such goods, and special circumstances render such loss or delay of peculiar injury to the consignee, the company is only liable for such damages as it might have reasonably foreseen would result. *Medway v. N. Y. & Erie R. Co.*, 20 *Barb.* 564; *Vicksburg & M. R. Co. v. Ragsdale*, 46 *Miss.* 458; *Hadley v. Baxendale*, 9 *Exch.* 349; *Baltimore & Ohio R. R. Co. v. Humphrey*, 9 *Am. & Eng. R. R. Cas.* 331.

Notice of Special Circumstances.—When the carrier has notice of the special circumstances, it is held liable for such damages as the said notice has or ought to have informed him would ensue. *Gee v. Lancashire & Yorkshire R. Co.*, 6 *H. & N.* 211; *Great Western R. Co. v. Redmayne*, *L. R.* 1 *C. P.* 329; *Home v. Midland R. Co.*, *L. R.* 8 *C. P.* 131; *King v. Woodbridge*, 34 *Vt.* 565; *Vicksburg & M. R. Co. v. Ragsdale*, 46 *Miss.* 458; *Priestly v. Northern I. & C. R. Co.*, 26 *Ill.* 205; *Illinois Central R. Co. v. Cobb*, 64 *Ill.* 128; *Toledo, W. & W. R. Co. v. Lockhart*, 71 *Ill.* 627; *Chicago, B. & Q. R. Co. v. Hall*, 83 *Ill.* 360; *Cunningham v. Great Northern R. Co.*, 49 *L. T. N. S.* 394; *s. c.* 16 *Am. & Eng. R. R. Cas.* 254; *Missouri Pacific R. Co. v. Nevin*, 16 *Am. & Eng. R. R. Cas.* 252.

Contracts and Expected Profits.—Where a party has actually entered into a contract which he is prevented from fulfilling through the railroad company's fault in losing or delaying goods, he may recover damages. *Frazer v. Smith*, 64 *Ill.* 128; *Harvey v. Connecticut & P. R. Co.*, 124 *Mass.* 421; *Priestly v. Northern Indiana & C. R. Co.*, 26 *Ill.* 205; *Chicago, B. & Q. R. Co. v. Hale*, 83 *Ill.* 860.

But the loss of contemplated or expected contracts or profits is too remote and speculative a ground upon which to base a claim for damages. *Woodger v. Great Western R. Co.*, *L. R.* 2 *C. P.* 218; *Penna. R. R. Co. v. Titusville Plank Road Co.*, 71 *Pa. St.* 350; *Ingledeu v. Northern R. Co.*, 7 *Gray*, (*Mass.*) 86.

Notice of Intention to Claim Damages for Loss of Goods.—A clause in a bill of lading exempting a company from liability for loss of goods unless a claim for damages is presented within a specified time after the loss is ordinarily held to be reasonable and valid, provided the specified time is not unreasonably short. *Express Co. v. Caldwell*, 21 *Wall.* 264; *Southern Express Co. v. Hunnicutt*, 54 *Miss.* 566; *Weir v. Express Co.*, 5 *Phila.* 355; *United States Express Co. v. Harris*, 51 *Ind.* 127; *Capenart v. Seaboard, etc., R. Co.*, 77 *N. C.* 355; *Lewis v. Great Western R. Co.*, 5 *H. & N.* 867.

But see *contra* *Adams Express Co. v. Reagan*, 29 *Ind.* 21; *Southern Express Co. v. Caperton*, 44 *Ala.* 101.

Where an unreasonably short time is given within which to present the claim, the clause is held to be invalid. *Memphis R. Co. v. Holloway*, 4 *L. & Eq. R.* 425; *Browning v. L. I. R. Co.*, 2 *Daly*, 117.

Presentation of Claim Before Withdrawal of Goods.—In certain cases where the injury, if any, is in its nature patent, it has been held that a stipulation is not unreasonable requiring the presentation of a claim for damages before the goods are taken away. *Goggin v. Kansas, etc., R. Co.*, 12 *Kans.*

416; *Bill v. Kansas, etc., R. Co.*, 63 Mo. 314; *Capenart v. Seaboard, etc., R. Co.*, 77 N. C. 855.

Notice of Claim not Condition Precedent.—A clause requiring a claim for loss or damage to be presented within a specified time after the goods are delivered has no application in a case where there has been no delivery of the goods. *Porter v. Southern Express Co.*, 4 S. C. 185.

Such a clause has in some cases been held not a condition precedent to plaintiff's right of action. If relied on as a defence, it must therefore be specially set up. *Westcott v. Fargo*, 61 N. Y. 452.

KIFF

v.

ATCHISON, TOPEKA & SANTA FE RAILROAD CO.

(*Advance Case, Kansas, 1884.*)

A railroad company received merchandise to be transported to a point beyond its own line of railroad, over its own and other lines of railroad connecting with it, and gave to the shipper its receipt stating that the merchandise was shipped "at owner's risk." *Held*, that this receipt is a special contract limiting the liability of the carrier, and that such connecting lines of railroad are entitled to the benefits of the exemption from liability specified in it, and that neither of the companies owning such connecting lines is liable for damages to the merchandise transported, unless it is shown that such damages arose from the negligence of the company sought to be charged.

On a trial before the court and a jury, if the evidence of the plaintiff tends to sustain his cause of action, the court should submit the case to the jury; but if the evidence of the plaintiff fails to sustain the main issue, or any material issue in the case, it is not error in the trial court to sustain a demurrer to the evidence.

ERROR from Reno county.

James McKinstry, for plaintiff in error.

A. A. Hurd, for defendant in error.

HURD, J.—The plaintiff below, the plaintiff in error here, commenced this suit before a justice of the peace of Reno county to recover damages by breaking of stoves, alleged to have been transported from Emporia to Hutchinson by the defendant, as a common carrier.

The bill of particulars is as follows:

"G. B. Kiff, plaintiff in the above entitled action, complains of the defendant, the Atchison, Topeka & Santa Fe Railroad Company, a corporation duly organized and existing under the laws of Kansas for that purpose. Whereas, the defendant undertook and agreed with plaintiff to carry from the city of Emporia to the city of Hutchinson, in the State of Kansas, in the month of May, 1883, three cook stoves. Plaintiff avers that defendant so carelessly and negligently handled said stoves while in its possession

as to break and damage them to the damage of the plaintiff in the sum of twenty-five dollars. Plaintiff also avers that the defendant charged him for hauling said stoves the sum of two dollars in excess of the legal rate and schedule rate of said company. Wherefore, plaintiff prays that he have judgment against defendant for the sum of \$27 and costs of suit."

On the trial the justice of the peace rendered judgment in favor of the plaintiff for twenty-four dollars and costs of suit. The defendant appealed to the district court of Reno county, and the case was tried in that court at the January term, 1884, before the court and a jury, and after the plaintiff had introduced his evidence and rested his case, the defendant demurred on the ground that the evidence does not prove or tend to prove any cause of action against the defendant. The court sustained the demurrer, discharged the jury and rendered judgment against the plaintiff for costs. The plaintiff filed his motion for a new trial, which was overruled, and made his case for the supreme court, which contains all the evidence and proceedings in the court below, and brings the case to this court by petition in error.

The evidence shows that on April 28th, 1883, the Cleveland Co-operative Stove Company, of St. Louis, delivered on the Missouri Pacific Railway Company, in St. Louis, the stoves in question, to be by it transported to Hutchinson, Kansas, and there delivered to plaintiff. The railroad company, on delivery of the stoves, delivered to the shippers a duplicate receipt, of which the following is a copy:

"St. Louis, April 28th, 1883.

"Received from the Cleveland Co-operative Stove Company, St. Louis Branch, 2900 11th Street, by Mo. Pac. R. R., the following property to be delivered in like good order, as addressed, without delay, at consignor's risk:

<p>Articles.</p> <p>3 Cooking Stoves,</p> <p>4 Stove Sections, weight 690 W.</p>	<p>For G. B. KIFF, Esq.,</p> <p>HUTCHINSON, KANSAS.</p> <p>Marks.</p> <p>K.</p> <p>'Owner's risk.'</p>
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"This duplicate dray ticket is sent you as a memorandum by which to check off goods. If the stoves, bundles, pieces, etc., do not agree with this, or the freight bill is overcharged, please return to us your freight bill at once, with this, noting thereon the charges, and we will attend to the matter with pleasure promptly."

This receipt is the only contract for the transportation of the stoves shown by the evidence, and under it they were transported, and on their arrival in Hutchinson were found to be broken and damaged. The evidence shows that the stoves were carried by

the Missouri Pacific Railway Company over a portion of its line, and delivered to the San Francisco Railroad Company, which carried them to Emporia, and there delivered them to defendant, which carried them to Hutchinson. Each of these connecting lines of transportation is entitled to the benefit of the special contract between the shippers and the Missouri Pacific Railway Company, and either of them, when sued, may claim the exemption of the contract. *Whitworth et al. v. Erie Railway Co.*, 87 N. Y. 414; s. c. 6 Am. & Eng. R. R. Cas. 349.

The plaintiff in his brief contends that "the record shows that these goods were shipped upon special contract termed by railroad companies as 'at owner's risk;' that it is well settled by the authorities cited in the brief that such contracts do not excuse companies for their own negligence." We agree with this view of the law, which is fully sustained by the decision of this court. *C. B. & St. J. R. Co. v. Simpson*, 30 Kans. 645.

The plaintiff further contends "that when a risk, for which a common carrier may be liable, is limited by a special contract, the burden of proof rests upon the carrier to show not only that the cause of the loss was within the terms of the limitation, but also upon its own part that there was no negligence." In this we do not agree with him. It is well settled that when the liability of the common carrier is limited by a special contract, the carrier is only liable for losses and damages caused by his own negligence, and the burden of proving the negligence is on the party who alleges it. *Steamboat Emily v. Carney et al.*, 5 Kas. 645; *Mo. Pac. Ry. Co. v. Haley*, 35 Kas. 36; s. c. 5 Am. & Eng. R. R. Cas. 594; *Sherman and Redfield on Negligence*, Sec. 12; *Whitworth v. Erie Railway Co.*, 37 N. Y. 413; s. c. 6 Am. & Eng. R. R. Cas. 349.

The plaintiff charges in his bill of particulars that the negligence of the defendant caused the damages which he seeks to recover in this suit, and it is incumbent on him to establish by his evidence that the negligence of the defendant alone caused the damage, and unless he has so shown, the judgment against him must be affirmed. The plaintiff now contends that these words in the shipper's receipt in evidence, "to be delivered in like good condition," is an admission by the Missouri Pacific Railroad Company that the stoves were in good condition when received, and the presumption was they would remain in the same condition to their destination; and as they were broken when they arrived there, the legal presumption is, that they were broken through the negligence of the carrier. We are of the opinion that the words referred to cannot be properly construed as claimed, and that their real meaning in the place found is, that the stoves should be delivered in the like condition as received; if in good order, then in the same condition; if broken or damaged, then in like condition. This is all of the

evidence relied on by plaintiff to establish negligence, and we think it does not prove negligence on the part of the defendant. When there is any evidence on the trial that tends to sustain the plaintiff's cause of action, it is the duty of the trial court to submit the case to the jury; but if there is no such evidence, or if the evidence fails to prove the main or a material issue in the case, the trial court may sustain the demurrer to the evidence.

We are unable to find any evidence in the record that shows or tends to show that the damages complained of arose from the negligence of the defendant, or in any manner to establish the liability of the defendant for the injury complained of, and therefore affirm the judgment.

Construction of Contract that Goods Shall be at "Owner's Risk."—Where a contract of transportation with a carrier provides that goods are to be at the "owner's risk," the company is bound nevertheless to exercise reasonable care and prudence. The owner only assumes liability for risks which the exercise of such care might be insufficient to prevent. *French v. Buffalo, etc., R. Co.*, 4 Keyes (N. Y.), 108; *Wells v. Steam Nav. Co.*, 8 N. Y. 875; *Nashville, etc., R. Co., v. Jackson*, 6 Heisk. 271; *D'Arc v. London, etc., R. Co.*, L. R. 9 C. P. 325; *Lewis v. Great Western R. Co.*, 26 W. R. 121; *Schieffelin v. Harvey*, 6 Johns. 170; *Canfield et al. v. Baltimore & Ohio R. Co.*, 93 N. Y. 532; s. c. 16 Am. & Eng. R. R. Cas. 152.

See *Stewart v. London & N. W. R. Co.*, 3 H. & C. 135; *Cohen v. South Eastern R. Co.*, L. R. 2 Exch. D. 253.

BRANCH & POPE

v.

WILMINGTON & WELDON RAILROAD COMPANY.

(88 North Carolina Reports, 573.)

The transcript of a record on appeal must show the matters at issue in the case; they cannot be supplied by a reference to those in the record of another case.

The declarations of an agent in reference to acts not within the scope of his agency are not admissible to affect the principal; therefore, in an action against a railroad company for the penalty for delay in shipment of local freight, it was held error to admit the declarations of a station agent, to the effect that the company, during a certain season, used most of its cars in transporting through freight—his agency being unconnected with the through freight business.

The clause in a bill of lading that the goods will be shipped "at the convenience of the company," will not protect it from liability for an unreasonable delay.

CIVIL ACTION tried at Fall Term, 1882, of Halifax Superior Court.

The defendant appealed.

Mullen & Moore, for plaintiffs.

Gatling & Whitaker and *Day & Zollicoffer*, for defendant.

SMITH, C. J.—The plaintiffs, on December 28, 1881, delivered to the defendant's agent at the depot of the company, in Enfield, twenty bales of lint cotton for transportation over its road and a connecting line, consigned to commission merchants in Norfolk, Virginia, and they remained in the defendant's warehouse until the 7th of January, 1882, before being sent off in the company's cars.

The bill of lading or receipt given to the plaintiffs, at the time of the deposit with the agent, contains a clause that the cotton is received "for transportation at company's convenience," and this was accepted by the plaintiffs.

The action is to recover the penalty given by the act of 1874-75, Ch. 240, Sec. 2, for allowing freight received for shipment to remain unshipped for more than five days, unless a contrary agreement be entered into, and the defence set up in the answer is, that "as soon as the defendant could provide the necessary cars, the said cotton was forwarded to the consignees, and that owing to the large amount of cotton and other freight delivered to the defendant for transportation at that season, it was impossible to ship the cotton at an earlier date."

The record states that all the issues, not setting them out, were found by the jury in favor of the plaintiffs, and this defect the counsel undertake to supply by a written agreement, signed by both, that the issues were the same as those in the record of the appeal in *Bell v. W. & W. Railroad Co.*, at this term, except as to the number of days in the third issue. We cannot recognize this method of amending the record, requiring the court to look into the transcript of another case to obtain the information necessary in deciding the appeal in this. That counsel by consent are permitted to do, and then the record is itself corrected.

We must, therefore, consider the issues submitted to the jury to be such as arise upon and are eliminated from the pleadings, and among them that raised in the concluding paragraph of the answer, alleging in excuse the inability of the defendant to provide cars for transportation sooner.

To combat the defence, resting upon a loose and imperfect statement of facts in explanation and excuse for the delay, one of the plaintiffs was examined on their behalf, and permitted, after objection, to testify to a declaration made by the company's agent, after the goods had been forwarded, in which the agent said, "they were not shipped sooner than they were because the company used most of its cars during that period (from December 28, 1881, to January 7, 1882) to transport through freight, which it preferred to local freight." It was shown, before the declaration was introduced, and in support of the objection to its admission, that the agent's authority extended to receiving and forwarding freight at that station; to the loading and unloading of cars; to the deliv-

ery of freight received, and collecting charges for transportation; and to conveying information to other agents of the company of the need of more cars. The agency was unconnected with through freight. To the reception of the proof of the agent's declarations the defendant excepted.

The substantial controversy between the parties, shown upon the pleadings, is as to matters of excuse sufficient, upon a fair and reasonable interpretation of the statute, to relieve the carrier company from the penalty imposed, as explained in the recent case of *Whitehead v. R. R. Co.*, 87 N. C. 255; s. c., 9 Am. & Eng. R. R. Cas. 168, and the evidence, if competent, was pertinent and material to the inquiry. That it was inadmissible, is expressly decided in *Smith v. R. R. Co.*, 68 N. C. 107, in which the rule is thus stated by Rodman, J.: "What an agent says in the course of doing an act in the scope of his agency, characterizing or qualifying the act, is admissible as part of the *res gestæ*. But if his right to act in the particular matter in question has ceased, his declarations are mere hearsay, which do not affect the principal."

The clause in the receipt assenting to the conveyance of the goods at the convenience of the company, cannot be permitted to protect the company from liability for an unreasonable detention of the goods in their warehouse, nor from the forfeiture incurred thereby. It would be against public policy to allow common carriers to free themselves from this common law obligation, by a stipulation that they should consult their own convenience about the time of carriage of goods entrusted to their custody for that purpose.

There is error, and there must be a *venire de novo*.

Error.

Venire de novo.

MISSOURI PACIFIC RAILROAD Co.

v.

YORK.

(*Advance Case, Texas, February 28, 1885.*)

Where a party sues for money shipped in baggage, and also for baggage lost *in transitu*, and the allegations of his petition are sufficient to warrant a recovery for the money lost, the fact that he did not recover for the money and the value of the goods lost was not within the jurisdiction of the court, is no ground for sustaining a plea to the jurisdiction.

Where goods are shipped as freight, the shipper shall use no fraud or artifice to deceive the carrier, whereby his risk is increased or his care and vigilance lessened. If there be such fraud or concealment the carrier is relieved from liability. There is a distinction with regard to money carried as part of freight and when carried as part of baggage.

APPEAL from Harris county.

Baker, Botts & Baker, for appellant.

T. E. Conn, for appellee.

WHITE, P. J.—Appellee concedes that the statement of the nature and result of the suit, as made in the brief of appellant, is substantially correct. It is as follows, viz.:

“In October, 1882, appellee with his family, consisting of his wife and nine children, ‘and one at the breast,’ were immigrants to this State from Van Buren county, in the State of Tennessee. He bought railroad tickets at McMinnville, Tenn.; from thence to Round Rock, Texas, and which were recognized and honored on appellant’s road from Little Rock to Round Rock. He had as baggage three trunks and four large boxes, for which he had baggage checks to Round Rock.

“Appellee did not stop at Round Rock, the place of his destination, and to which his baggage was checked, but continued on to Austin. The next day he returned to Taylor, and delivered his baggage checks to the baggage-master at Taylor, who gave him a receipt for them, and he went from thence to Belton, Texas, and very soon afterward received at that place all his baggage except one trunk, which contained ten bed quilts valued at \$8 each, \$80; two coverlets valued at \$10 each, \$20; two counterpanes valued at \$6 each, \$12; two sheets valued at \$2; one handsaw valued at \$1.50; one memorandum book containing in United States currency \$400.

“For these articles, or their value, he sues. He did not present his checks or demand his baggage at Round Rock, nor was it at Taylor when he delivered his checks to the baggage-master at that station. He had retained out of the trunk, in money, about \$600, which was sufficient for his expenses to Belton. He filed suit May 28, 1884.

“1. Appellant pleaded to the jurisdiction of the court on the ground that the money sued for, not being baggage, was included and sued for fraudulently, for the purpose of giving the County Court jurisdiction.

“2. General denial.

“3. That the money sued for was not necessary to the comfort or convenience of appellee and his family as travelers or passengers; that appellee had no notice that it was packed as baggage, and if lost, it was not through the negligence of the carrier.

“The court reduced to writing separately its finding of facts and conclusions of law, which will be found on pages 21 to 27 of transcript. The finding of facts and value of goods sued for were in substance as herein first stated. The court found that the quilts, coverlets, sheets and counterpanes were reasonable baggage, but that it was not made known to appellee that the \$400 was packed with those articles as baggage; that appellee had on his person \$600 after buying his tickets, which was sufficient to meet all his demands on the trip, and then rendered judgment for appellee for \$115, the value of the quilts, counterpanes, sheets and coverlets, and for costs of suit.”

Before filing the answer appellant had filed a demurrer to the petition because want of jurisdiction was apparent from the face of the same, in that it showed no liability of appellant as a common carrier for the money sued for as part of the baggage, and that, eliminating the item of money sued for from the sum claimed, the balance—the value of the household goods lost—was not sufficient to give the court jurisdiction. A plea to the jurisdiction was also interposed, embodying, as we have seen, the same proposition.

With regard to the money claimed to have been lost, the allegation in plaintiff's petition was "that in October, 1883, plaintiff was informed, and believed, that pickpockets and thieves frequented the depots and great lines of railways operated by defendants, over which, with his family, plaintiff was to be carried, and against whose pernicious operations the defendant had not provided adequate protection for passengers; that by reason of which facts it became and was advisable for plaintiff to carry in his baggage such sum of money as might be *necessary* to provide for the safety and comfort of his family according to their circumstances in life, in case of emergency, on so long a journey; that from McMinnville, in Tennessee, to Austin, in Texas, was about 2,000 miles; that \$400 was not an unreasonable nor unusual amount of money to carry with a family of nine persons on such a journey as was undertaken by plaintiff on said 25th day of October, 1882, all of which defendant well knew, or by due diligence might have known," etc.

Where goods are shipped as *freight*, the rule is that the shipper shall use no fraud or artifice to deceive the carrier, whereby his risk is increased or his care and vigilance may be lessened. And if there is any such fraud or concealment, it will exempt the carrier from responsibility under the contract; or, more properly speaking, it will make the contract a nullity. Story on Bailments, Sec. 565; 2 Con. Rep.; Willson, Sec. 74, 319. But there is a distinction made in the rules obtaining with regard to money when carried as a part of *freight* and when carried as part of *baggage*. What may legitimately be considered as baggage depends "to a great extent upon the circumstances of each individual case; upon the length of the journey, the purpose for which it is made, the position in life and occupation of the traveler, the mode of conveyance and the character of country through which he intends to pass. * * * Anything may be carried as personal baggage which passengers usually carry for their *personal* use, comfort, instruction or amusement, having regard to the circumstances above enumerated." Thomp. on Carriers of Pass., p. 510; W. & W.'s Con. Rep., Sec. 1255, Secs. 614, 615. To subject common carriers to damages for the loss of personal baggage of a passenger, it must strictly be baggage; that is, such articles of necessity and

personal convenience as are usually carried by travelers. *Pardee v. Drew*, 25 Wend., 458. It seems, however, that a common carrier is liable for money in a trunk not exceeding an amount ordinarily carried for traveling expenses. *Orange County Bank v. Brown*, 9 Wend., 85; *W. & W.'s Con. Rep.*, Sec. 615.

We are of the opinion that the allegations of plaintiff, with reference to the money claimed to be lost, were sufficiently explicit under the rules governing the right to recover such as baggage, and that the court did not err in overruling defendant's demurrer, or special exception to that portion of the petition.

The second assignment of error is that the court should have rendered judgment for appellant on its plea to the jurisdiction, because the proof, as well as the petition, shows no liability as a common carrier for the money, and that the value of the goods claimed was insufficient to give the court jurisdiction, wherefore the money could and must have been claimed only to confer jurisdiction. It is insisted that because the proof shows that appellee had on his person a sum of money amply sufficient to defray the necessary expenses of the trip beyond that claimed to have been in the trunk, therefore the claim for the latter sum was improper and illegal, and must have been made only to make out the jurisdiction of the county court, and that, such being the case, the court, on the evidence, should have sustained the plea of jurisdiction. In support of the position we are cited to *King v. Watson*, 2 Con. Rep., Willson, Sec. 235.

The cases are not analogous. We have seen that the petition in this case did state a cause of action for the money, and the money alone (\$400), without the goods, would have conferred jurisdiction. That plaintiff failed to recover his \$400 is not evidence of an attempted or intended fraud upon the jurisdiction. Notwithstanding his failure to recover, he might have believed, and honestly so, that he was entitled to recover the \$400. Whether he was or not, was a question of fact to be determined from the circumstances of the case by the jury or court trying it. We do not think that the court erred in refusing to enter judgment for defendant on the plea of jurisdiction.

But it is insisted that the household goods in the trunk were not "baggage" within the usual and legal signification of the term; that they were intended for use at the end of the journey, and there was no testimony tending to show that anything contained in the lost trunk was intended for the personal comfort and convenience of the plaintiff or any of his family on the trip. This was a question of fact to be determined by the court passing upon it as a jury would have done, and we cannot say that the court, under the circumstances, erred in holding that the articles were baggage. Many circumstances might have happened on the trip which would have rendered each and all of the articles necessary

to the convenience and comfort of plaintiff and his family, or passengers generally on the route of such a trip. *W. & W.'s Con. Rep.*, Sec. 614; 2 *Con. Rep.*, Willson, Sec. 33.

We do not believe that any reversible error has been committed in the trial of this case in the court below, and the judgment is therefore affirmed.

Affirmed.

Consignor is Bound Not to Deceive Carrier as to Value of Goods.—The general principle is well settled that a person transmitting goods by a railroad company is bound to use no fraud or artifice to conceal from the agents of the company the true value thereof. *McCance v. London & N. W. R. Co.*, 7 H. & N. 477; *Great Northern R. Co. v. Shepherd*, 14 Eng. L. & Eq. 367; *Reef v. Rapp*, 3 W. & S. 21; *Orange Co. Bank v. Brown*, 9 Wend. 116; *St. John v. Express Co.*, 1 Woods 573; *Cove v. Hasley*, 19 Pa. St. 243; *Everett v. Southern Express Co.*, 46 Ga. 303; *Houston & T. C. R. Co. v. Burke*, 9 Am. & Eng. R. R. Cas. 59; *Texas Express Co. v. Scott*, 16 Am. & Eng. R. R. Cas. 111; *Graves v. Lake Shore & M. S. R. Co.*, 16 Am. & Eng. R. R. Cas. 108.

Liability of Company for Money Transported as Baggage.—When a passenger carries money in his trunk as part of his baggage, and the same is lost, the railroad company is only responsible for such a sum as is reasonable to meet ordinary current traveling expenses. *Merrill v. Grinnell*, 30 N. Y. 594; *Grant v. Newton*, 1 E. D. Smith, 95; *Whitmore v. steamer "Caroline"*, 20 Mo. 518; *Jordan v. Fall River R. Co.*, 5 Cush. 69; *Dunlap v. International Steamboat Co.*, 98 Mass. 371; *Dibble v. Brown*, 12 Ga. 217; *Davis v. Michigan, etc., R. Co.*, 22 Ill. 278; *Orange Co. Bank v. Brown*, 9 Wend. 85; *Hickox v. Nantuxatuck R. Co.*, 31 Conn. 281; *Hutchings v. Western, etc., R. Co.*, 25 Ga. 61; *Phelps v. London, etc., R. Co.*, 19 C. B. (N. S.) 321; *Butcher v. London, etc., R. Co.*, 16 C. B. 13; *Illinois, etc., R. R. Co. v. Copeland*, 24 Ill. 332; *Cincinnati, etc., R. Co. v. Marcus*, 38 Ill. 219; *Weed v. Saratoga, etc., R. Co.*, 19 Wend. 534.

Some cases go so far as to hold that even a small sum to meet current traveling expenses is not baggage. *Davis v. Michigan, etc., R. Co.*, 22 Ill. 278; *Grant v. Newton*, 1 E. D. Smith, 95.

A complete list of the authorities as to what is and what is not properly included within the term "baggage" will be found in *Texas & H. C. R. Co. v. Cappa*, 16 Am. & Eng. R. R. Cas. 128.

DENVER, SOUTH PARK & PACIFIC RAILROAD COMPANY

v.

ROBERTS.

(6 *Colorado Reports*, 333.)

As railway companies have made their checks evidence in regard to the delivery of baggage, the possession of such check is evidence against the company of the receipt of the baggage.

APPEAL from County Court of Chaffee county.

The case is stated in the opinion.

Henry C. Dillon, for appellant.

BECK, J.—This was an action brought originally before a justice of the peace of Alpine precinct, in Chaffee county, by Roberts,

the appellee, against the Denver, South Park & Pacific Railroad Company, for the value of a trunk and its contents claimed to have been delivered by the plaintiff to the defendant, at the Union depot, in Denver, to be shipped to Buena Vista, in Chaffee county.

The evidence clearly establishes the undertaking of the defendant to transport plaintiff and his baggage to Buena Vista. Plaintiff arrived by Kansas Pacific Railroad at the Union depot in Denver, from Chicago, April 7, 1880. He held a through check for his trunk, and saw it unloaded from the baggage car of the train upon which he arrived. He immediately purchased a ticket over defendant's road to Buena Vista; surrendered his duplicate check to defendant's baggage agent, receiving in return check 609, mentioned by the witnesses. These facts are evidence that the defendant received plaintiff's trunk, and agreed to transport both him and his trunk to Buena Vista. Upon his arrival at the latter place, he presented his check and was offered a zinc trunk instead of his own, which was a russet trunk. Add to this the further fact, that the zinc trunk was immediately returned to Denver by defendant and surrendered to a passenger, who, as defendant's baggage agent testified, "held a Hannibal & St. Jo. check for it, and who proved ownership and took it away," and the conclusion necessarily is that defendant's agent in Denver, after receiving the plaintiff's trunk, and stripping off the Chicago check, by mistake checked for him the wrong trunk to Buena Vista. Both the law and the evidence are with the plaintiff. Redfield on Carriers, 71, 73. The judgment is affirmed.

Affirmed.

Baggage Checks.—The holding of a check for baggage by a party constitutes *prima facie* evidence on his part that he has delivered baggage to the carrier for transportation. *Davis v. Mich. S. & N. Ind. R. Co.*, 22 Ill. 278; *Atchison, T. & S. T. R. Co. v. Brewer*, 20 Kans. 669; *Louisville & N. R. Co. v. Weaver*, 9 Lea (Tenn.) 38.

But the presumption is only *prima facie* and is capable of being rebutted. *Chicago, etc., R. R. Co. v. Clayton*, 78 Ill. 616; *Lake Shore & M. S. R. Co. v. Lassen*, 1 N. Bradw. (Ill.) 659.

But a check is a mere token and does not in itself constitute a contract of carriage. *Isaacson v. New York Central H. R. R. Co.*, 16 Am. & Eng. R. R. Cas. 188.

GULF, COLORADO & SANTA FE R. Co.

v.

CLARK *et al.*

(Advance Case, Texas, Jan. 14, 1885.)

In Texas, on an appeal to the county court from the judgment of a justice of the peace, the judge may deliver a charge to the jury.

A consignee is not bound to receive his freight at any other than the point of destination. He may do so, however, and relieve the carrier from liability. An action will lie against a carrier for non-delivery of property at its destination, though partially injured, and that by the act of God.

Where there is evidence adduced showing a tender of freight at a place other than the proper destination, the question of tender is one of law, and the court is not required to submit that issue to the jury.

Where there is no evidence adduced as to the value of the use of goods lost by a carrier, and the requested charge also embodies a rule restricting and limiting the right of the plaintiff to recover the value of the goods without explaining how such value is to be ascertained, the charge was correctly refused.

The measure of damages for the loss of goods is their fair market value at the point of destination, with legal interest thereon from the date when they should have been delivered. The rule does not apply where the goods are old. In such case the particular value of the goods to the owner forms the measure of damages.

The mere failure of a consignor to inform the carrier of the value of goods is not *per se* such fraud as will discharge the carrier. The consignor is not bound to disclose the value of the goods unless asked.

APPEAL from Washington county.

Searcy & Bryan, for appellant.

R. S. Tarver, for appellees.

WHITE, P. J.—This suit was filed January 24, 1884, in the Justice's Court, in Washington county, by Ada Clark against the Gulf, Colorado & Santa Fe Railroad Company, to recover the sum of \$150, as actual damages for certain articles of bedding, clothing, etc., alleged by plaintiff to have been shipped by her over defendant's road and lost; and for the further sum of forty-five dollars alleged to be the reasonable value of the use or rent of the same. On April 25, 1884, the case was tried in the justice's court, when the jury rendered a verdict in favor of the plaintiff for the sum of ninety-eight dollars. The defendant appealed from the judgment in the justice's court to the county court of Washington county. On May 10, 1884, the case was tried by a jury in the county court, and resulted in a judgment for the plaintiff for the sum of sixty dollars. From this judgment defendant prosecutes this appeal.

The only error relied upon by appellant for a reversal of the judgment is the action of the lower court in refusing to give, in the charge to the jury, the following instructions asked by the defendant, viz. :

First—If the jury believe, from the evidence, that the bundle offered by the defendant to the plaintiff is the same or a part of the same bedding shipped by the plaintiff over the defendant's road at the time claimed, then the plaintiff is bound to accept the articles tendered her, and can only recover for damages done said bedding, and for articles lost—if any were lost—and what damage the plaintiff may have sustained by reason of the detention of said bedding offered to be returned.

Second—The plaintiff cannot recover for the use of the articles absolutely lost, if any were lost, but the value of the articles is the sole measure of damages.

Third—The plaintiff cannot recover the value of the articles of clothing said to have been lost, she having shipped the same in a bundle as bedding, and not notified the defendant that the bundle contained anything but bedding.

Fourth—The measure of damage, if the plaintiff has shown that she has sustained damage, is the reasonable market value of the articles lost at the time they were lost, with eight per cent. from the date of their loss, and the reasonable value of the articles detained and offered to be returned, if any.

Fifth—The jury are the exclusive judges of the weight of the testimony and credibility of the witnesses.

On these charges the judges made the following endorsement: "Refused because not believed to be the law, and because this is an appeal case from a justice of the peace court, in which case the county judge is not required to give a charge to the jury. The rules of practice, as applied by a justice of the peace, being also the rules of practice in the county court in the trial *de novo*."

No charge whatever was given the jury in the case. We will examine the reasons given by the court for refusing defendant's instructions.

Two reasons are given. First, because the instructions are not law; second, because in appeal cases from justices to the county court on the trial *de novo*, the county judge is not required to give a charge to the jury.

We will examine this last ground of refusal first. In support of this ground the learned judge says the rules of practice provided for a justice's court are the rules which govern in the county court in the trial *de novo* on appeal. Is this proposition correct? If so, then the reason is sound, because it is expressly provided by statute "that the mode of proceeding on trial (in justice's court) before the jury shall be the same so far as applicable, as is prescribed by the district and county courts, in the chapters relating thereto, except that the justice shall not deliver any charge to the jury." (Rev. Stats., Art. 1608.)

This inhibition, in our opinion, however, applies alone to cases on trial in the justice's court, and many good reasons might be assigned in support of it, as thus limited, which we will not now stop to consider. This rule is limited in terms by the statute to the justice, and does not apply to cases pending in the county court, whether they originate in or are taken there by appeal. After a cause reaches the county court on appeal from the justice's court, it is to be tried *de novo* on the merits, just as though it had originated in that court. The practice, in so far as the court is concerned, is the same. Parties, it is true, are not allowed nor permitted to plead in such cases new causes of action, or defences which were not pleaded by them in the justice's court (W. & W.'s Con. Rep., Sec. 239), but independently of this restriction as to

pleading, the trial is had as though the cause had originated in the county court. In the county court, with regard to the charge, the same practice is applicable as prescribed for the district court. (Rev. Stats. Chap. 12.)

After the argument the judge may, if he deems it necessary, deliver a charge in writing to the jury on the law of the case. Rev. Stats., Arts. 1316, 1317. Whether a charge is delivered by the judge of his own motion, or not, either party may present special instructions, which, if they are refused, constitute a part of the record of the cause, and are subject to revision for error without the necessity of taking any bill of exception thereto. Rev. Stats., Arts. 1319, 1320.

It follows, from the views we have expressed, that the second reason assigned by the court for the refusal of defendant's requested instructions was incorrect and not good in law. We come, then, to consider the only other question; that is, were the instructions applicable to the facts, and did they enunciate correct principles of law?

It is shown by the evidence in the case that the goods claimed to have been lost were shipped by appellee from Brenham to a point on the road called Quarry, and consisted of a bundle of bedding, and articles of clothing in the bundle of bedding; that the railroad agent had no notice that the bundle contained clothing, but shipped it solely as bedding; that about three weeks before trial another agent of defendant found the bundle of bedding at a station called Gay Hill, a short distance from Quarry, and that he tendered the same to plaintiff, and she refused to receive it because she said it was not her property; that is, not one of the bundles shipped by her over defendant's road.

Defendant had pleaded this tender of the goods to plaintiff, and upon this plea, and the above evidence to sustain it, defendant's first special instruction is evidently predicated. A valid tender is not established by the evidence. Even admitting that the bundle tendered plaintiff by defendant's agent at Gay Hill was her property, she was not bound to accept and receive it at that point, and she could not have been concluded by a tender at any point other than Quarry, the point of destination. The consignee is entitled to receive his goods at the place where the carrier undertook and bound himself to deliver them, and is under no obligation to seek, demand or receive them elsewhere. *H. & T. C. R. R. Co. v. Adams*, 49 Tex. 748. "An action will lie against a common carrier for the non-delivery of property at its destination, although partially injured, and that by the act of God." *H. & T. C. R. R. Co. v. Harn*, 44 Tex. 628. "It may be stated generally that every delivery must be made to the right person at a reasonable time, at the proper place, and in a proper manner. These are all requisites of a valid delivery except in so far as a compliance with them

may be waived by the party entitled to the goods. If tendered to the proper person at an unreasonable time, at an improper place, or in an improper manner, he may still accept the goods, and by so doing he of course waives all objections which he might have urged against their acceptance under the circumstances, and acquits the carrier of all further liability. But if he refuse to receive them for any of these reasons, and it should turn out that the carrier was in fault, such tender will not relieve him from his responsibility for the safety of the goods." Hutchinson on Carriers, Sec. 340.

Defendant having failed to establish a tender valid in law, the court was not bound to charge the jury upon a state of case not made by the evidence, and, therefore, did not err in refusing the first special requested instruction. For the same reason the second requested instruction was properly refused, because there was in the first place no evidence adduced of the value of *the use* of the articles lost, and in the second place the instruction limits and restricts the right of plaintiff to recover the value of the articles, without explaining how the value was to be ascertained, as the sole measure of damages for the loss. As to some of the facts, this case is not unlike the Missouri Pacific Railroad Co. v. Hewitt, in which it is said: "The measure of damages in this suit is the fair market value at the point of destination of the goods lost, with legal interest thereon from the date when the goods should have been delivered." 2 Con. Rep., Willson, Sec. 273, citing W. & W.'s Con. Rep., Secs. 67, 206, 207. 1254; and Fowler v. Davenport, 21 Tex. 647.

The rule as to the measure of damages in quite a similar case, and where the articles lost were second-hand clothing, etc., is thus stated by Willie, C. J., in I. & G. N. R. R. Co. v. Nicholson, 3 Texas Law Review, 334. He says: "In fact, the lost articles seemed to be of such a character, viz., second-hand furniture, books and table furniture, which had been used by the plaintiff, that they could not be said to have to him a value at one place different from what they possessed at another. He could hardly have supplied himself in the market with goods in the same condition, and so exactly suited to his purposes, as were those of which he had been deprived. As compensation for the actual loss is the fundamental principle upon which this measure of damages rests, it would seem that the value of the goods to their owner would furnish the proper rule upon which he should recover. Not any fanciful price that he might, for special reasons, place upon them, nor on the other hand the amount for which he could sell them to others, but the actual loss in money he would sustain by being deprived of articles so specially adapted to the use of himself and family." * * * * * "There can be no general rule laid down as to the value of second-hand goods, as compared to the

value of those that are new, and any attempted rule on that subject would but tend to confuse the jury, or cause them to find upon a different state of facts from that presented to them."

If it had been otherwise correct, still, as to the measure of damages, the second instruction was too general, and not sufficiently full or explicit. It was defective in both the particulars we have pointed out, and the court did not err in refusing to give it. A bill of exceptions was reserved by defendant to the action of the court in permitting plaintiff, over defendant's objections, to prove the value of certain articles of clothing claimed to have been wrapped up in the lost bundle of bedding, the objection being that the bundle was shipped as bedding, and bedding did not include clothing, etc. Defendant's third special instruction, which was refused, also presented this same question. In support of the position or principle embodied in this instruction, we are cited by appellant to the *Texas Express Co. v. Scott*, 16 Am. & Eng. R. R. Cas. 111. If it had been shown that the goods or clothing had been fraudulently wrapped by plaintiff in the bedding for the purpose of concealing their value, then indeed such fraud would operate to discharge the carrier from liability. The evidence here fails to disclose any imposition or fraud on the part of appellee. "A mere failure on the part of the shipper to inform the carrier of the value of the goods shipped would not *per se* be such fraud as would discharge the carrier." * * * "The party who sends the goods is not bound to disclose their value unless he is asked." *Texas Express Co. v. Scott*, *supra*; *Hutchinson on Carriers*, Secs. 439, 440.

The court did not err either in admitting the evidence complained of or in refusing the third instruction with regard to it, because the testimony utterly fails to show any fraud, deceit, or imposition, or concealment practiced by appellee in the mode she adopted for the shipment of these articles of second-hand clothing.

The rule as to what is the proper measure of damage in this case has already been stated in the quotation above made from the case of *I. & G. N. R. R. Co. v. Nicholson*, and it will readily be seen that defendant's fourth instruction is not in harmony with that rule, because the instruction declares that reasonable *market value* of the articles lost, at the time they were lost, the proper measure, and that is not the rule as enunciated by the Supreme Court. As to the fifth, whilst a correct proposition of law, its refusal was not reversible error, especially when embodied in a number of charges, none of which were correct.

We have been unable to discover that any material reversible error was committed in this case by the trial court, and the judgment is therefore affirmed.

Affirmed.

Damages for Non-Delivery of Goods.—When goods are lost by the railroad company and are never delivered at their destination, the ordinary

measure of damages is the market value of the goods at the point of destination less the freight. *Chapman v. Ry. Co.*, 26 Wisc. 295; *Whitney v. Ry. Co.*, 27 Wisc. 327; *Perkins v. Ry. Co.*, 47 Me. 373; *O'Hanlon v. Ry. Co.*, 6 B. & S. 484; *Northern Trans. Co. v. McClary*, 66 Ill. 233; *Hackett v. Railroad*, 85 N. H. 390; *Sturgess v. Bissell*, 46 N. Y. 462; *Holden v. New York Central R. Co.*, 54 N. Y. 662; *Michigan, S. & N. Ind. R. Co. v. Caster*, 13 Ind. 164; *Evansville, etc., R. R. Co. v. Montgomery*, 9 Am. & Eng. R. R. Cas. 195; *Baltimore & Ohio R. Co. v. Humphrey*, 9 Am. & Eng. R. R. Cas. 331; *Texas, etc., R. R. Co. v. Ferguson*, 9 Am. & Eng. R. R. Cas. 395; *Louisville & N. R. Co. v. Mason*, 16 Am. & Eng. R. R. Cas. 241.

Shipper of Loads Not Bound to Disclose Value.—A party shipping goods by a railroad company is not bound to disclose their value unless he is asked so to do. In the absence of improper means or artifices to conceal the value of the goods, mere silence upon his part does not amount to fraud. *Gorham Mfg Co. v. Fargo*, 45 How. Pr. 90; *Lebeau v. General Steam Nav. Co.*, L. R. 8 C. P. 88; *Phillips v. Earl*, 8 Pick. 182; *Southern Express Co. v. Crook*, 44 Ala. 468; *Sewall v. Allen*, 6 Wend. 349; *Hollister v. Newlin*, 19 Wend. 234; *Camden & Amboy R. Co. v. Baldauf*, 16 Pa. St. 67; *Texas Express Co. v. Scott*, 16 Am. & Eng. R. R. Cas. 111; *Adams Express Co. v. Boskowitz*, 16 Am. & Eng. R. R. Cas. 102.

SOUTH & NORTH ALABAMA R. R. Co.

v.

WOOD.

(72 *Alabama Reports*, 451.)

When a quantity of corn is delivered to a railroad company for transportation, the consignee having bought it and paid the freight on it, he is the proper party to sue for its non-delivery, and not the consignor from whom he bought it; but the evidence as to these facts being conflicting, the question is properly submitted to the decision of the jury.

In an action against a railroad company as a common carrier for a failure to deliver goods received for transportation, the measure of damages is the value of the goods at the place of destination.

In an action against a railroad company as a common carrier to recover damages for its failure to deliver a quantity of corn, received by it for transportation from one intermediate station to another, about eighty miles apart, the value of the corn at the place of delivery to the railroad, at the time of its delivery, is relevant and competent evidence on the question of its value at the point of destination.

The statements contained in a bill of exceptions, reserved on a former trial, are not competent evidence to contradict the testimony of a witness on a subsequent trial.

APPEAL from the Circuit Court of Blount.

This action was brought by Edmund A. Wood against the appellant, a domestic corporation, to recover damages for its failure to deliver a certain quantity of corn, delivered to the defendant, as a common carrier, at Bangor, a station on its road near Blountsville, to be delivered to L. K. Moss, at Jemison, another station about eighty miles distant. The action was commenced before a justice, on July 12, 1876, and was removed into the circuit court by appeal at the instance of the defendant. The case has been before this court on two former appeals, and may be

found reported in 66 Ala. 167, and 71 Ala. 215. On the last trial, as shown by the bill of exceptions in the present record, numerous exceptions were reserved by the defendant, on which assignments of error are founded, eighteen in number; but the points decided by this court render it unnecessary to state the facts in detail.

Samuel F. Rice and J. W. Inzer, for appellant.

Hamill & Dickinson, contra.

STONE, J.—The present is an action against the railroad company for an alleged failure to safely transport and deliver corn placed in car at one of defendant's depots, and consigned, not to a regular depot, but to a siding which was not a depot, and at which the railroad company kept no agent; the distance to be transported being about eighty miles. The contract was, that the railroad would transport a car-load of corn in the shuck; and to this end, the company placed one of its cars at the depot of shipment to receive the corn. When the loading was completed, the car was locked by the railroad's agent; and after it was placed on the siding at the destination, it was unlocked by one of the railroad's employes at the request of the consignee. It is alleged that about one-fourth of the corn was lost in the transit. The complaint consists of a single count for the non-delivery of the corn. This case has been twice before in this court (9 Am. & Eng. R. R. Cas. 419; 16 Am. & Eng. R. R. Cas. 247); but the points decided on those appeals are not directly presented in this.

One question raised by the defence in this case is, that Wood, the plaintiff, was not the owner of the corn when the action was brought, but that Moss was, and should have been the plaintiff. The testimony on this question is not very clear, and appears to be somewhat confused. The bill of exceptions states that it contains all the evidence. One part of the testimony is emphatic, that Wood sold to Moss 300 bushels of corn, to be delivered at Bangor in Blount county; and some of the witnesses testify that quantity was delivered in car at Bangor. Moss testifies he paid the freight on the car-load of corn, and had it consigned to him at Smith's mill siding. If this be the true and full version of the transaction, then the corn became the property of Moss, when it was delivered in car at Bangor; and if this be so, and if there are no qualifying facts in the transaction, then Moss alone could sue for the failure to deliver; for the corn was his, and the contract of affreightment was with him. But there is testimony not easily reconcilable with this. Wood, the plaintiff, testified that the corn, for which this action was brought, was his property at and before the commencement of this suit; and Moss testified that he had no interest in the suit, nor in the corn sued for. This seeming dis-

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mony ought to have been admitted, as shedding some light on the question. They rely on *Foster v. Rodgers*, 27 Ala. 602; and *Ward v. Reynolds*, 32 Ala. 384, in support of their views. The first of those cases cites no authority in support of it, and the last cites only the first. The first arose on the value, and comparative value of certain grades of cotton. The cotton was sold by sample in Alabama; and testimony was received of the comparative value in New Orleans, to which place it had been shipped. This court, in declaring the evidence admissible, stated, among other things, that the evidence showed "that the relative value of the two cottons was the same in Montgomery and at New Orleans." The value of cotton, all over the country, is regulated by the price at New York, or Liverpool; and, making allowance for transportation and its incidents, the price of any given grade at one place is substantially the price at all others.

In *Ward v. Reynolds*, the question arose on the value of a slave, at that time a species of property, and probably of uniform value throughout the State. I doubt the soundness of both decisions; and even if sound, I think the principle should not be extended to such a commodity as corn, or any other article of commerce of such varying and fluctuating value.

The bill of exceptions taken on the former trial, offered as evidence to contradict what some of the witnesses testified to on the last trial, was rightfully rejected. It was not a document or writing made by the witness, nor submitted to him for correction. It was not evidence for such a purpose, even if a proper predicate had been laid. 2 Brick. Dig. 548, Secs. 117, 118.

Paragraph numbered 2 of the charge given by the court of its own motion is not reconcilable with the views expressed above; and charges numbered 2, 3, 7, 10, 11, 14, asked by defendant, should each have been given. Charges numbered 1, 4, 8, 12, 13, are, some of them, involved, and others argumentative, and should not have been given. Charges 5 and 6 were rightly refused.

Reversed and remanded.

General Reference.—Both of the questions touched on in the principal case, viz., the party to sue in case of loss of goods by a common carrier and the measure of damages recoverable, will be found to be fully considered in the note to *Denver, South Park & Pac. R. Co. v. Frame*, *infra*.

DENVER, SOUTH PARK & PACIFIC R. R. Co.

v.

FRAME.

(6 Colorado Reports, 882.)

Special property in goods may, under the Code, enable a party to sue in his own name as in replevin or trover. Where the entire property is in the

consignor, he is the proper party to sue; where the entire property is in the consignee, the latter sues; when both are interested, one as general, the other as a special owner, either may sue. A recovery in such action, properly instituted, will be a bar to any subsequent action against the same defendant at the suit of another party having either a general or special property in the goods.

In case of loss of goods for which a carrier becomes liable, the general rule is, that the measure of damages is the value of the goods at the point of destination; but the rule is more especially applicable to goods shipped for sale in the ordinary course of commercial traffic, and not to household goods and wearing apparel in use. In such cases the measure of damages is a matter of law to be decided by the court.

APPEAL from County Court of Chaffee county.

The facts are sufficiently stated in the opinion.

H. C. Dillon, for appellant.

Ellsworth & Vanatta, for appellee.

STONE, J.—Appellee sued the appellant company to recover for the loss of a box and contents delivered to the company for shipment over their railroad to Buena Vista. Appellee in testifying described each article contained in the box from a list produced, and stated their value separately. The goods consisted of articles of wearing apparel for himself and wife, bedding, tableware, cooking utensils and some carpenter tools. Witness stated the cost price, ten months previously, amounting to \$372.50, and deducted \$72.50 “for wear and tear.”

Upon cross-examination the appellee stated that certain of the goods, which he specified in detail, belonged to his wife as her individual property.

Appellant thereupon moved to strike out all evidence of the loss and value of such goods as were admitted by appellee to be the separate property of his wife. The motion was overruled, and this is made the ground of the first error assigned.

Counsel for appellant contends that since the Code requires that all suits shall be prosecuted in the name of “the real party in interest,” and since our statute confers upon married women the right to sue in respect to their separate property the same as if they were sole, no right of action accrued to the appellant in this case respecting the goods which were owned by his wife.

This contention cannot avail the appellant as a defence to the action. The appellee had a special property in the goods and a beneficial interest in the recovery therefor, which gave him a right to sue in his own name the same as in actions of replevin for the possession, or in trover upon a conversion.

In this class of cases an agent or bailee may sue where he has a special property in the goods or a beneficial interest therein. Angell on Carriers, Sec. 492.

To the extent of this interest the appellee was a real party in interest.

Besides, the bill of lading in evidence shows that the goods were

shipped by appellee in his own name, that he paid the freight therefor, and that the box was to be delivered to him at the point of destination. He was therefore both consignor and consignee, and appellant, having dealt with him as the rightful custodian, cannot be heard to say that he is not entitled to sue on a breach of the contract.

Mr. Angell, in treating of the proper parties to sue, as between consignor and consignee on a contract of carriage, lays down the following summary of the law in such cases: *First*, where the entire property is in the consignor, he is the proper party to sue. *Second*, where the entire property is in the consignee, the latter sues. *Third*, where both are interested, one as general, the other as a special owner, then either may sue. Angell on Carriers, Sec. 495.

And a recovery in such action, properly instituted, will be a bar to any subsequent action against the same defendant at the suit of another party having either a general or special property in the goods. Redfield on Carriers, Sec. 321.

In such cases, "whichever first obtains damages, it is a full satisfaction." Angell on Carriers, Sec. 493; *G. W. R. R. Co. v. McComas*, 33 Ill. 185.

Where the consignor ships on a special agreement that he pays freight, it is no answer in a suit by him that he is not the owner. Angell on Carriers, Sec. 500.

The carrier, as agent for the consignor from whom it receives the property for shipment, is not at liberty to dispute the title of such consignor in an action brought by him. *G. W. R. R. Co. v. McComas*, *supra*.

The second and third assignments are based upon the same ground, substantially, as the first, and are sufficiently answered by what we have thereon announced. The questions presented by the other assignments of errors arise upon the rulings of the court allowing certain questions to be answered by a witness and in disallowing others.

One Jonsen was called by appellant as an "expert" to testify as to the value of the lost goods. He stated that he was "a dealer in furniture and second-hand household goods" in Buena Vista, and knew the value of such goods at that point in June, the month in which the goods in question were shipped. The witness was then asked the following question: "Supposing the overcoat mentioned in this list by the plaintiff to have been made of good woolen stuff, bought new ten months ago at a cost of fifteen dollars, and to have received the most careful usage since that time that a laboring man bestows upon such goods, what would be its value in the market at Buena Vista in June last?" An objection to this question was sustained by the court, and this ruling is made the ground of the fourth assignment of error.

Although of little importance, considering that the trial was to the court without the intervention of a jury, we think that the ruling of the court was not improper.

The statement of the witness, that he was a dealer in "furniture and second-hand household goods," was no evidence that he knew anything more about the value of clothing than the court who was trying the case. More than this, there was no evidence that there was any "market" or "market value" whatever at Buena Vista for the property in question.

In case of loss of goods for which a carrier becomes liable, the general rule is, that the measure of damage is the value of the goods at the point of destination. Sedgwick on Meas. Dam. 356.

But this general rule is not applicable in every case, and to every class and species of personal property. The rule is more especially applied to goods shipped for sale in the ordinary course of commercial traffic, where a profit is expected to be realized from sale at the point of destination, over the cost price at place of shipment.

As to certain other goods, such as wearing apparel in use, and certain articles of household goods and furniture, kept for personal use and not for sale, while they have a real intrinsic value to the owner, they may have little or no market value whatever at the point of destination; they are not shipped as marketable goods. The market value of many such articles depends on style and fashion, irrespective of actual value for use. In some cases the owner may not be able to replace them in any market. In such cases the value is to be properly fixed by considerations of cost and of actual worth at the time of the loss, without reference to what they could be sold for in a particular market, or hawked off for by a second-hand dealer, where they happened to be unladed.

The following question was then asked the witness: "Please look at the list of goods and examine the description and character of the same as mentioned in the list; and supposing those goods, as testified by the plaintiff, to have been purchased ten months ago at the prices mentioned in that list, and supposing them to have received the best of care which a laboring man in their use could bestow upon them, what depreciation in value would they have sustained at the end of that time?"

The question was objected to by appellee, and the objection overruled. The witness answered: "They would have depreciated at least fifty per cent. in value."

The appellant then "offered to prove by expert testimony" of this witness, "that the goods mentioned by the plaintiff could not possibly have been packed into a box of the dimensions sworn to by the plaintiff;" and appellant further "offered to prove by expert testimony that the articles claimed by plaintiff to have been packed in that box would have weighed at least 400 pounds instead of 200 pounds, as shown by the shipping bill."

Both these offers were objected to by appellee and the objections sustained, and the error predicated thereon constitutes the fifth and sixth assignments.

The testimony offered was wholly incompetent. Without an inspection of the box and the articles themselves, or knowledge of the size and weight of each, such an opinion could have had no value or weight whatever against the positive testimony of the appellee that the box contained all of the articles mentioned in the inventory produced by him in court. Even if such a question could be allowed under any circumstances, this witness was not shown to be an expert in weights and measures.

Upon cross-examination, this witness testified that he never saw the goods in question, that he did not know whether they were bought in Canada or the United States, and the following question was then propounded: "Supposing them to have been bought in Canada ten months ago, where there is no protective tariff, and brought from there to the United States, where such goods are worth more new, would you take off as much as fifty per cent. depreciation?" The question was objected to by appellant, the objection overruled, and the witness then answered that "if goods are cheaper in Canada than in the United States, the per cent. of depreciation ought not to be so much."

The ruling of the court in allowing this question to be asked and answered is the seventh assignment of error.

There was no evidence before the court that all of the goods were purchased in Canada, and the question in itself was not a proper one, but the testimony could not have prejudiced the appellant. The question was hypothetical, and the answer could but serve merely to qualify the answer of the same witness to the hypothetical question put to him on his direct examination, respecting the per cent. of depreciation in the value of the goods in the case supposed.

As to the eighth assignment of error, respecting the refusal of the court to allow the defendant's offer of certain so-called "expert" testimony, counsel for appellant argues in favor of the admissibility of the testimony offered, on the assumption that the purpose of such testimony being to show the market value of the goods at Buena Vista, its rejection was error. Since we have, in considering the former assignments, already passed upon the question of market value at Buena Vista, as affecting the measure of damages in this case, we need add nothing to what has already been said upon this point further than to observe that, in all cases like this, the measure of damages is a matter of law to be decided by the court. Sedgwick, Meas. Dam. 604. And we see no error in the ruling of the court upon this point sufficient to warrant a reversal.

The objections of appellant embraced in the other assignments of error are sufficiently met by what we have said in passing upon the foregoing, and need not be further noticed.

Perceiving no material error in the record, the judgment will be affirmed.

Affirmed.

Party Contracting with Carrier May Bring Suit for Loss of Goods.—It is in many cases held that the person making the contract of transportation with the carrier is the party entitled to bring an action in case of a failure to deliver the goods, or an injury thereto, and this irrespective of the question whether or not he has any title thereto.* *Blanchard v. Page*, 8 Gray, 281; *Finn v. Railroad Co.*, 112 Mass. 524; *Southern Express Co. v. Craft*, 49 Miss. 480; *Hooper v. Railway*, 27 Wisc. 81; *Dunlop v. Lambert*, 6 Cl. & Fin. 600.

Consignee Must Bring Suit.—But where the shipper has parted with his interest in the goods, and the actual owner is the consignee, the latter alone is entitled to bring suit. *Blum et al. v. The Caddo*, 1 Woods, 64; *Griffith v. Ingleden*, 6 S. & R. 429; *Potter v. Lansing*, 1 Johns. 215; *Green v. Clark*, 12 N. Y. 343; *Krulder v. Ellison*, 47 N. Y. 36; *Canfield v. Northern R. Co.*, 18 Barb. 586; *Gwyn v. Richmond, etc., R. Co.*, 6 Am. & Eng. R. R. Cas. 452; *Everett v. Saltus*, 15 Wendell, 474; *South & North Ala. R. Co. v. Wood*, 72 Ala. 451; s. c. *supra*.

Consignor Retaining Interest Must Bring Suit.—When, however, the consignor retains any contingent interest whatever in the goods, other than the mere right of stoppage *in transitu*, he is entitled in case of loss or non-delivery to recover damages from the carrier. *Sweet v. Barney*, 23 N. Y. 335; *Conger v. Railroad Co.*, 17 Wisc. 447; *W. & A. R. R. Co. v. Kelly*, 1 Head, 158; *Sanford v. Railroad Co.*, 11 Cush. 155; *Price v. Powell*, 3 N. Y. 322; *Sargent v. Morris*, 3 B. & Ald. 277; *O'Neill v. Railroad Co.*, 60 N. Y. 138.

And see *Snider v. Adams Express Co.*, 77 Mo. 523; s. c. 16 Am. & Eng. R. R. Cas. 261.

Recovery Either by Consignor or Consignee Bars Recovery by the Other.—Where both the consignor and the consignee have an interest in the goods, one having a general and the other a special property, either may sue, but a recovery by one constitutes a bar to an action by the other. *Green v. Clark*, 12 N. Y. 343; *Steamboat "Farmer" v. McCraw*, 26 Ala. 189.

Damages for Failure to Deliver Goods.—When a common carrier fails to transport goods to the point of destination, the damages usually recoverable are the value of the goods at that point, with interest from the time they should have been delivered, less the amount of the freight. *Whitney v. Railroad Co.*, 27 Wisc. 327; *Chapman v. Railroad Co.*, 26 Wisc. 295; *Northern Transportation Co. v. McClary*, 66 Ill. 233; *Sturgess v. Bissell*, 46 N. Y. 462; *Gray v. Packet Co.*, 64 Mo. 47; *Perkins v. Railroad Co.*, 47 Me. 573; *Chicago & N. W. R. Co. v. Dickman*, 74 Ill. 249; *Hackett v. Railroad Co.*, 35 N. H. 390; *O'Hanlon v. Railroad Co.*, 6 Best. & S. 484; *Erie R. Co. v. Lockwood*, 28 Ohio St. 358; *Colt v. Illinois R. R. Co.*, 38 Iowa, 601; *Robinson v. Merchants Dispatch Co.*, 45 Iowa, 470; *Forbes v. Boston, etc., R. R. Co.*, 9 Am. & Eng. R. R. Cas. 76; *Baltimore & Ohio R. R. Co. v. Humphrey*, 9 Am. & Eng. R. R. Cas. 331; *Louisville & N. R. R. Co. v. Mason*, 11 Lea (Tenn.), 116; s. c. 16 Am. & Eng. R. R. Cas. 241.

Loss of Household Goods, Furniture, etc.—In cases where the articles lost are household goods or the like, the same strict rule cannot be applied, as such articles cannot be said to have a fixed market value. *Marsh v. Union Pacific R. Co.*, 6 Am. & Eng. R. R. Cas. 359; *Denver & South Park R. Co. v. Frame*, 6 Col. 382; s. c. *supra*.

See particularly *Houston & T. C. R. R. Co. v. Burke*, 9 Am. & Eng. R. R. Cas. 59, where the question arose as to the measure of damages for the loss of a family picture.

Evidence of Value of Goods at Destination.—In an action against a carrier for causing the loss of goods, the shipper may testify as to their value, though he is ignorant of their value at their destination. *Marsh v. Union Pacific R. Co.*, 6 Am. & Eng. R. R. Cas. 359.

The shipper cannot object to the introduction of evidence as to the value of the goods at the point of shipment, for this can do him no harm. *Evansville, etc., R. R. Co. v. Montgomery*, 9 Am. & Eng. R. R. Cas. 195. And it is relevant and competent evidence. *South & North Alabama R. R. Co. v. Wood*, 72 Ala. 451; s. c. *supra*.

Direct evidence as to the value of the goods at their destination is not indispensable. It is sufficient that there be evidence of their value in the market of a neighboring State connected with the place by railroad. *Louisville & N. R. R. Co. v. Mason*, 11 Lea (Tenn.), 116; s. c. 16 Am. & Eng. R. R. Cas. 241.

HOT SPRINGS RAILROAD COMPANY

v.

HUDGINS.

(42 *Arkansas Reports*, 485.)

When, in an action against a common carrier for non-delivery of goods to a consignee, it pleads, only, that it never received the goods, this is an admission of the non-delivery to the consignee; and proof of the non-delivery to the consignee is not necessary to entitle the plaintiff to a judgment.

APPEAL from Garland Circuit Court.

J. M. Moore, for appellant.

R. G. Davies, for appellee.

SMITH, J.—This action was begun before a justice of the peace.

The plaintiff alleged that he had delivered to the railroad company a bale of cotton to be transported to Senter & Co., at St. Louis, and that the defendant had failed to deliver the same to the consignee. The action was defended, as we learn from the justice's minutes, upon the ground that the company had never received the cotton. But the plaintiff recovered a verdict and judgment.

On appeal to the circuit court, no other or different issue appears to have been tendered. A jury was waived and the trial was by the court.

The plaintiff proved the delivery of the cotton to the defendant by the production of the bill of lading, signed by the defendant's agent at Hot Springs, and the value of the cotton. This was all the testimony.

The court declared that the sole issue was, whether or not the railroad company had received the cotton, and refused to declare that non-delivery to the consignee must also be proved to sustain the action.

In an action against a carrier for the loss or non-delivery of goods, the complaint involves three points of facts, which the plaintiff must establish upon the general issue, viz., the contract for carriage, delivery to the carrier, and the defendant's breach of promise or duty. 2 Green. Ev., Secs. 208, 213.

But the effect of every special plea is to narrow the issues. And a party is not required to prove what his adversary admits.

Before a justice of the peace the pleadings are not required to be in writing; but, if oral, it is the duty of the justice to note down in his docket the substance of them. Gantt's Digest, Sec. 3740.

By denying that it had ever received the goods for transportation, the defendant admitted that it had never delivered them to Senter & Co. Consequently, when it was proved that the defendant had received the cotton under a contract for carriage, the case was legally adjudged against it. We must presume, in the absence of any amendment of the plea, that the parties went to trial upon the same issue that was made in the justice's court.

Such was evidently the understanding of the trial court.

Affirmed.

CHICAGO, ST. LOUIS & NEW ORLEANS R. R. Co.

v.

PROVINE.

(61 *Mississippi Reports*, 288.)

In an action against a railroad company for the non-delivery of cotton shipped in November, 1879, and in March, 1881, it was error to allow the plaintiff to amend his bill of particulars so as to charge the cotton, sued for to have been lost "during the cotton season of 1879-1880."

To authorize the introduction of books of account as evidence of the facts entered, it must be shown that they have been fairly and honestly kept; that they are the books of the party engaged in the business to which they refer; that the entries were made in the usual course of business at or about the time when the facts entered transpired; that the entries are original and made by a party having knowledge of the facts entered, or that information thereof was communicated to the party by whom the entries were made by some person engaged in the business, whose duty it was to transact the particular business and make report thereof for entry on the books, and such report and entry must be made at the time of the occurrence or before the facts can be supposed to have passed from his recollection.

Where the absence of an allegation would render a declaration demurrable, then the allegation must be proved as averred, unless its truth is admitted by plea.

In suits on contracts of shipment, slight proof of non-delivery is sufficient to put the burden of showing delivery on the defendant, but there must be some proof by the plaintiff. It is therefore not sufficient for plaintiff to show that four bales of goods, marked with his initials, were delivered to another consignee as the property of another consignor for *non constat*, but this was a proper delivery, and that plaintiff's cotton was also properly delivered.

APPEAL from the Circuit Court of Yalobusha county.

The facts are stated in the opinion.

W. P. & J. B. Harris, for appellant.

A. H. Whitfield, for appellee.

COOPER, J.—This is an action by the appellee to recover from the appellant the value of fourteen bales of cotton delivered to the company at Coffeeville, in this State, to be by it transported to the city of New Orleans, in the State of Louisiana. The declaration contains two counts, one for the non-delivery of thirteen bales shipped on the — day of November, 1879, and the other for the non-delivery of one bale shipped in March, 1880. The defendant pleaded the general issue. During the progress of the trial the plaintiff offered to introduce in evidence certain books which had been kept by him in his business as a merchant for the purpose of establishing thereby, in connection with other evidence, the delivery of the cotton to the defendant. To the admission of these books the defendant interposed two objections, one to their competency as a whole, the other to the introduction of any parts of said book which related to any other time than that at which the cotton sued for was said to have been delivered. To obviate the latter objection, the plaintiff asked and obtained leave to amend his bill of particulars so as to charge the cotton sued for to have been lost during the cotton season of 1879 and 1880. The defendant objected to the amendment on the ground that the bill of particulars as amended would give the defendant no notice of what cotton was sued for. The amendment should not have been permitted. The office of a bill of particulars is to give the defendant specific information of the cause of action, a detailed statement of which cannot in many cases be intelligently given in the declaration without great prolixity. It cannot, therefore, be less specific than the declaration, nor include any items not embraced in the scope of the declaration. The plaintiff by his suit demanded the value of certain cotton shipped in November, 1879, and March, 1880. The bill of particulars should have stated, as definitely as the plaintiff's information permitted, the dates of the shipments, the marks and weight of the bales, and the names of the persons to whom it had been consigned. As amended, it not only failed to give specific information as to the cotton sued for, but enlarges the scope of the very general allegations of the declaration so as to include any loss of any cotton shipped at any time during the year. The plaintiff sued the defendant for the breach of two contracts, one made in November, 1879, the other in March, 1880; the objection of the defendant was, in effect, a request by him that the plaintiff should be limited in the introduction of evidence to the issue joined. By the amendment to the bill of particulars the plaintiff obtained the right to recover for the breach of other contracts not named in the pleadings; and on looking to the evidence introduced on the trial, and to the verdict of the jury, it is apparent that a trial was had on the bill of particulars as amended and not on the issue joined, and that a judgment has been rendered which, if

supported by the evidence, was in part at least for the breach of other contracts than those sued on. If the declaration itself had been amended so as to let in the proof subsequently introduced, a recovery could not have been had to the extent of the judgment rendered. Except as to four bales of the cotton referred to in the testimony, the plaintiff himself is in great uncertainty. The substance of his testimony is that he bought and shipped 1,322 bales of cotton during the season, and received account of sales of only 1,308 bales. This cotton was shipped from time to time, under probably more than 100 contracts of shipment, in lots of varying numbers, to several different commission houses, and which particular bales were lost (except the four bales marked "A. F. P."), or to whom it was consigned, or when shipped, the plaintiff is not able to say. He cannot, therefore, prove the breach of any one contract of shipment separated from the whole number. If the suit had been for the breach of each one of all the contracts of shipment, the plaintiff could not have recovered without proof of the breach of one, for the contracts being separate and independent, the issues would also have been separate and independent, and before the plaintiff could have recovered on any one of the issues, he must have established the particular breach put in issue, and evidence of a great shortage on all the shipments would have been incompetent as evidence of a breach of any particular one.

The books offered by the plaintiff consisted of what are called cotton blotters and a cotton shipping book, which seems to have been made by copying from the blotters. The blotters contained entries of cotton bought by the plaintiff from his various customers, with the weight and price of each bale and the date of its purchase. The cotton so bought was all shipped, as the plaintiff stated, through the defendant, to the city of New Orleans. The entries in these books were made sometimes by one and sometimes by another of his employes; some of these persons were introduced as witnesses and testified that the entries made by them respectively were made in the usual course of business, and at or about the time of the occurrences entered, and that the books were fairly and honestly kept; but they also stated that the entries were not always made from their personal knowledge of the facts, but from reports made to them by others, and it does not appear that the persons communicating the facts had personal knowledge of their existence, or that it was their business to transact the business referred to. The rule is, that to authorize the introduction of books of account as evidence of the facts entered, it must be shown that they have been fairly and honestly kept, that they are the books of a party engaged in the business to which they refer, that the entries were made in the usual course of business, at or about the time the facts entered transpired, that the entries are original and made by a party having knowledge of the facts

entered, or that information thereof was communicated to the party by whom the entries were made by some person engaged in the business, whose duty it was to transact the particular business and make report thereof for entry on the books, and such report and entry must be made at the time of the occurrence or before the facts can be supposed to have passed from his recollection. *Price v. The Earl of Torrington*, 1 Smith's Leading Cases and notes. The depositions of the witnesses Meyer and Copp should have been excluded on the defendant's objection. These witnesses knew nothing of their own personal knowledge, and testified only as to the conclusions drawn by them from an examination of the books of their respective houses. The register kept by the defendants in their office was properly admitted. It was proper to admit proof of what the custom of the defendant was as to the receipt of cotton for shipment. If the plaintiff delivered the cotton in the generally recognized manner which had been acquiesced in by the company, such delivery was good. It was incumbent on the plaintiff to sustain by proof all the material allegations of his declaration, and one of these is that the defendant failed to deliver the cotton at the place to which it was consigned. The general test is, that where the absence of an allegation would render a declaration demurrable, then the allegation must be proved as averred, unless its truth be admitted by the plea of the defendant. In cases of this character, slight proof of non-delivery is sufficient to put the burden of showing delivery on the defendant, but there must be some proof by the plaintiff. It is not sufficient that the plaintiff has shown that four bales of cotton marked "A. F. P." (as was his cotton) were delivered by the defendant to another consignee, as the property of another consignor, for *non constat* that this was a proper delivery and that plaintiff's cotton was also properly delivered.

Judgment reversed.

JORDAN

v.

PENNSYLVANIA CO.

(*Advance Case, Indiana, 1884.*)

The delivery to the acceptor of a draft of an unindorsed bill of lading is insufficient to transfer the title to the property covered thereby.

In such case the carrier is not liable to the shipper for the value of the goods should the acceptor fail to pay the draft.

APPEAL from Marion Special Term. The plaintiff had judgment below. Defendant moved for a new trial, which was denied, and they appeal.

TAYLOR, J.—This is a suit by the plaintiff to recover the value of twelve barrels of eggs shipped by the plaintiff over the defendant's line of road, from the city of Indianapolis, in the State of Indiana, to the city of Baltimore, in the State of Maryland, which the plaintiff alleges were delivered by the defendant to a person to whom the bill of lading was not indorsed, and without an order from the plaintiff for their delivery.

The defence of the defendant is, first, the general denial, and second, a special answer setting up facts in bar of the suit. The plaintiff's reply to the special answer is a general denial.

The cause was tried by the court upon agreed facts which, so far as within the issue and material to state, are these: The defendant was, on the 18th day of March, 1883, and for many years prior thereto, a common carrier of goods for hire, and as such was the owner and operator of a fast freight line from the city of Indianapolis, Ind., to the city of Baltimore, Md., known and designated as the "Union Line." On the 18th day of March, 1883, the plaintiff delivered to the defendant, at Indianapolis, Ind., for transportation to the city of Baltimore, Md., twelve barrels of eggs. At the time of the delivery the defendant delivered to the plaintiff its receipt for the eggs, in which is acknowledged their delivery in good order, and the undertaking to deliver them in like good order without delay to the plaintiff at the station of Baltimore, Md. On this receipt, under the head of "Marks," is the following: "J."—"Notify Henry E. Hopkins & Co., 60 Hanover street, Baltimore." The defendant at the same time delivered to the plaintiff a bill of lading for the eggs, on the margin of which, under the head of "Marks," is the following: "J."—"Notify Henry E. Hopkins & Co., 60 Hanover street, Baltimore, Md." A way bill accompanied the shipment of the eggs, on which was the following: "A. Jordan—Ord. A. Jordan—J.—Notify Henry E. Hopkins & Co., 60 Hanover street, Baltimore, Md." The eggs were immediately shipped and transported by the defendant to the city of Baltimore, Md. Immediately upon receipt of the bill of lading the plaintiff forwarded to the ——— Bank, at said city of Baltimore, his certain draft, payable one day after sight, drawn by him in his own favor upon said Henry E. Hopkins & Co. the draft being for the value of the eggs; and the plaintiff attached to the draft and forwarded with it the bill of lading, but did not indorse the bill of lading. Henry E. Hopkins & Co. accepted the draft, and thereupon the Baltimore Bank, to which plaintiff had sent the draft with the attached bill of lading, delivered the unindorsed bill of lading to said Hopkins & Co., and they presented it to the defendant at said city of Baltimore, and thereupon demanded the delivery to them of the eggs, and they were delivered by the defendant to said Hopkins & Co., and the bill of lading was surrendered to the

defendant. Within a reasonable time after the arrival of the eggs at the city of Baltimore, the plaintiff demanded at said city of the defendant the delivery to him of the eggs, offering to pay any and all freights and charges due thereon, and the defendant refused to make such delivery, alleging that the eggs had already been delivered to said Hopkins & Co. The eggs were of the value of \$146, and the defendant has never delivered the eggs nor any part of them to the plaintiff, and has never paid the plaintiff any part of their value; and the plaintiff has never received any compensation for the eggs from any source. The trial court found for the plaintiff, and rendered judgment in his favor against the defendant for the value of the eggs. The defendant moved for a new trial, which was refused: and the proper exception was taken by the defendant.

There is but one question to consider. Was the delivery of the eggs to Henry E. Hopkins & Co. a lawful delivery? This question answered in the affirmative, the judgment of the trial court must be reversed; but if it is answered in the negative, the judgment should stand.

The right of the plaintiff to make any reservation in the bill of lading that he pleased, to secure the payment of the value of the eggs, is settled. He had the right to fix the person to whom and the terms upon which the defendant should deliver the eggs. He could instruct the bank to whom he sent the time draft with the bill of lading attached not to deliver the bill of lading to the acceptors until the draft was paid; and in such case, delivery of the bill of lading before such payment would not have passed the title to such bill. It was the duty of the defendant to deliver the eggs to the plaintiff, or according to his instructions. If the defendant violated its contract for the delivery made a misdelivery of the eggs, it is liable as for their conversion. *Hutchinson on Car.* 102; *Benjamin on Sales* (3d Am. ed.), Sec. 382; *Stollenwerck v. Thatcher*, 115 Mass. 224; *Jones on Pledge*, Secs. 257, 258; *Ivatts on Car., etc.*, 417. The bill of lading is in the usual form, and the delivery by it as well as by the receipt and way-bill is to the order of the plaintiff. The direction to notify Henry E. Hopkins & Co. may be considered as indicating that they had an interest in the eggs either as vendees or factors. In the absence of any expressed declaration, it is susceptible of no other meaning. As soon as the bill of lading is delivered to the plaintiff, he draws the time draft on Henry E. Hopkins & Co., attaches the bill of lading to it, and forwards the draft with the attached bill to the Baltimore Bank for presentation to Henry E. Hopkins & Co. The time draft so drawn and sent with the bill of lading attached covers the value of the eggs shipped, and is not indorsed by the plaintiff; but there is no evidence that any special instructions were given by the plaintiff to the bank to withhold delivery of

the bill of lading until the draft was paid, or other conditions performed, and the question must be considered as if there were no such instructions, leaving the bank in the position of a general agent in this particular matter, with such powers and duties as that relation implies. On receipt of the draft and attached bill of lading, the Baltimore Bank presents the draft to Henry E. Hopkins & Co., who accept it, and the bank detaches the bill of lading and delivers it to said Hopkins & Co., who take and present it to the defendant, and demand the delivery of the eggs; and the defendant thereupon delivers the eggs to said Hopkins & Co., and takes up the bill of lading.

The Baltimore Bank was the agent of the plaintiff, and, in the absence of special instructions to the contrary, had the right to surrender the bill of lading to Henry E. Hopkins & Co. on their acceptance of the draft; indeed, it is not stating the rule too strong to say that it was the duty of the bank to do so. And there can be no question but that the delivery of the bill of lading to Henry E. Hopkins & Co., the acceptors of the time draft, by the bank agent of the plaintiff, checked by no instructions to the contrary, transferred the eggs to the acceptors, Henry E. Hopkins & Co., without its formal indorsement by the plaintiff.

If the plaintiff had not intended that the bill of lading should be delivered to Henry E. Hopkins & Co., on their acceptance of the time draft, he should have so instructed his agent, the Baltimore Bank. The burden was upon him, and, in the absence of proof to the contrary, the presumption is against the plaintiff: it is that he not only intended to but actually did part with the title to the bill of lading, and transfer the eggs to the acceptors of the time draft. This results whether the plaintiff is to be held as a vendor and the acceptors as vendees of the eggs, or if the acceptors are to be considered as factors, agents, or as pledgees.

But the correct conclusion from the facts of the case is, as it seems to me, that the acceptors of the time draft were purchasers of the eggs, and paid for them by the accepted draft; for, in the absence of any showing to the contrary, the draft must be considered as a negotiable instrument, the giving up of which is presumed to be payment for whatever given.

These principles are, in my opinion, sustained by the following authorities: Daniels on Neg. Inst., Sec. 223; Jones on Pledge, Secs. 256, 257, 258, 262; City Bank of Rochester v. Jones, 4 N. Y. 497, 507; City Bank v. Rome, W. & O. R. Co., 44 *id.* 136; Merchants Bank v. Union R & T. Co., 69 *id.* 379; Michigan Cent. R. Co. v. Phillips, 60 Ill. 190; Holmes v. German Security Bank, 87 Penn. St. 525; Emory Sons v. Irving Nat. Bank, 25 Ohio St. 360, 366; National Bank of Green Bay v. Dearborn, 115 Mass. 222; J. M. & I. R. Co. v. Irvin, 46 Ind. 180, 186; Colebrook on Collat. Sec., Secs. 380, 382, 409; Lambeth v.

Turnbull, 5 Rob. 264; National Bank v. Merchants Bank, 91 U. S. 92; Low v. DeWolf, 8 Pick. 101; Smith v. Bettger, 68 Ind. 254.

The intent of the plaintiff is only to be judged from what he did and what he failed to do. It was in his power to make his own terms—to give his own instructions—explicit and not the subject of doubt. This the law required of him. That he made a mistake and met with loss in trusting the acceptors, Hopkins & Co., is no evidence of an intention, *pre-existent* or existent at the time, that the bill of lading should be held by his agents, the Baltimore Bank, after its acceptance by Hopkins & Co., until they paid the draft. The sanction of such a rule would be the introduction of a new and uncertain if not destructive element in the administration of the law.

Therefore, it is my conclusion that the delivery of the eggs by the defendant to Henry E. Hopkins & Co., the acceptors of the time draft, was a rightful delivery, and that the judgment of the special term should be reversed.

The judgment of the special term is reversed, and the cause remanded with instructions to enter judgment on the agreed facts for the defendant.

The other judges concurred.

Delivery of Unindorsed Bill of Lading.—When goods are shipped under a bill of lading, drawn to the order of the shipper, the delivery over of such bill of lading unindorsed will pass title to the goods, and authorize the delivery of them by the carrier to the holder. Merchants Bank of Canada v. Union R. R. & Trans. Co., 8 Hun. 249; s. c. 69 N. Y. 373; Forbes v. Fitchburg R. R. Co., 9 Am. & Eng. R. R. Cas. 80; City Bank v. Rome, Watertown & Ogdensburgh R. Co., 44 N. Y. 136; Michigan Central R. Co. v. Phillips, 60 Ill. 190; Marine Bank of Chicago v. Wright, 46 Barb. 45; Ohio & Miss. R. R. Co. v. Kerr, 49 Ill. 459; Emery v. Irving Nat. Bank, 25 Ohio St. 360.

And see Miller v. Hannibal & St. Joe R. Co., 90 N. Y. 430; s. c. 12 Am. & Eng. R. R. Cas. 80.

MACVEAGH *et al.*

v.

ATCHISON, T. & S. F. R. Co.

(*Advance Case, New Mexico, January 19, 1885.*)

A railroad company who, upon notice from the owner of goods to stop them *in transitu* and hold them for such owner, complies, does not become party to a new contract of carriage by the subsequent order of the owner to ship them to another person and place.

A common carrier is only liable where the injurious act complained of is the proximate and not the remote cause of the loss.

Seizure under legal process, like the act of God, will excuse the common carrier from delivering goods intrusted to his care for shipment.

It is not the duty of a common carrier to remove goods committed to him, in order to prevent their being subjected to an attachment levy.

If property in the hands of a common carrier is seized under legal process, and the owner has timely knowledge thereof, the carrier has a right to pre-

sume that such owner will take the proper steps in the premises without formal notice from him. In such a case the negligence and *laches* of the owner, if it does not occasion the loss, so far contributes towards it that he must bear the burden of it, and he cannot be heard to attribute the fault to another.

APPEAL from District Court, Bernalillo county.

W. B. Childers, for appellants.

H. L. Waldo, for appellee.

AXTELL, C. J.—This is an action brought to recover the value of certain goods, wares and merchandise alleged to have been shipped by the plaintiffs over the railroad of the defendant, and to have been lost by the negligence of the defendant. The declaration contains two counts—one in case, the other in trover. The defence was the general issue, and a special plea setting up the seizure of the goods under legal process. The court on the trial below directed a verdict for defendant. It appears from the evidence that Franklin MacVeagh & Co., a firm in Chicago, having sold on credit certain groceries to Richards & Co., a firm at Cerillos, in Santa Fe county, New Mexico, on the 16th day of February, 1882, delivered these goods at Chicago to the Chicago, Burlington & Quincy Railroad Company, to be shipped over said company's road to Atchison, Kansas, and thence over the railroad of the defendant to Cerillos, a station on the line of defendant's road. After the goods were shipped, Richards & Co., the consignees, became insolvent, still indebted to plaintiffs for the goods. On the 26th day of February, plaintiffs requested Ripley, agent of the Chicago, Burlington & Quincy Railroad Company at Chicago, to stop the goods, if possible, at Pueblo, and change consignment to read: "Order Franklin MacVeagh & Co." Or, if too late to stop at Pueblo, to make consignment read: "To order Franklin MacVeagh & Co., Cerillos." The plaintiffs were advised, March 6th, that the goods were held at Cerillos, as requested by him. Subsequently, plaintiffs, through the Chicago, Burlington & Quincy Railroad Company, ordered these goods to be shipped to one C. A. Stein, at Albuquerque. It does not appear from the record at what precise time this order was received, although it is to be gathered from a letter of Peabody, defendant's agent at Atchison, under date of March 31st, that he had some previous knowledge of such order. The goods were never shipped by the defendant from Cerillos, but remained there until the 16th day of March, when one N. B. Laughlin presented his authority as deputy sheriff of Santa Fe county, produced and read certain writs of attachment, declared to the agent that he attached the goods in question as the property of Richards & Co., and would hold the railroad company responsible for them, but did not take the goods into manual possession, nor summon the defendant as garnishee. Thereafter the goods remained in the possession of

the defendant until April 19th, following, when, as alleged by defendant, they were actually seized and taken possession of by the sheriff under said writs of attachment. These goods having reached their place of destination and been held for plaintiffs, as requested, we think the contract of carriage had terminated, and the liability of the defendant as a warehouseman had begun. It makes no difference that the goods had not been removed from the car.

It is in evidence that the defendant had no depot or warehouse building at Cerillos, its business being transacted in a box car. To render the defendant liable as a common carrier for the loss of these goods, a new contract must be shown to have been entered into between the plaintiffs and defendant, followed by a loss through the negligence of the defendant. The order to ship to Stein, at Albuquerque, of itself does not constitute such a contract. Some promise or undertaking by the defendant to carry as ordered must appear, but the evidence does not disclose it. For refusing to carry when ordered or requested so to do, a common carrier will be subjected to liability. The obligation is to carry, and he may not ignore it; but the cause of action stated does not proceed upon the theory that defendant refused to carry, but that it undertook and through negligence failed to deliver. It is contended that this acknowledgment by the defendant that it held the goods at Cerillos subject to the order of plaintiffs as requested by them, and the subsequent order to ship to Stein, Albuquerque, constituted a contract. Fairly construed, this acknowledgment by the defendant had no other object or effect than to recognize the ownership of the goods as being in the plaintiffs instead of Richards & Co., against whom they were exercising the right of *stoppage in transitu*, and merely changed the destination of the goods at Cerillos to MacVeagh & Co. The right of action, if any, was against the defendant as a warehouseman for failing to forward, and not as a common carrier. But should it be conceded that the facts proved constituted a contract to carry to Albuquerque, and the goods being in the hands of the defendant, liability as a common carrier thereby attached, still the defendant is not liable for the delay in keeping these goods at Cerillos, by means whereof they became exposed to seizure under legal process. A common carrier, the same as any other person, is only liable where the injurious act complained of is the proximate and not the remote cause of the loss. That these goods would not have been seized upon legal process as the property of a third person, and hence not lost to the plaintiffs, if they had been forwarded promptly to Albuquerque, does not make the defendant liable. Seizure under legal process, like the act of God, will excuse the common carrier from delivering goods intrusted to his care for shipment. There is no pretence in this case that there was any collusion on the part of the defendant to have these goods seized, but only that the

delay exposed them to seizure. For this the defendant is not liable. The injury complained of must be shown to be the direct consequence of the defendant's negligence. It is not enough that the negligence of the defendant contributed as a remote cause to the loss which happened. The failure to ship promptly and the detention at Cerillos, at most, was the remote cause of the loss. *Hoadley v. Transportation Co.*, 115 Mass. 304; *Railroad Co. v. Reeves*, 10 Wall. 176. Nor is it considered that the delay occurring after the 16th of March, the action of the deputy sheriff lacking as it did some of the technical essentials of a valid levy, and although it might have been reasonably anticipated that it might be followed by a more formal proceeding, was changed into the class of proximate as distinguished from remote causes. Besides, it is not altogether certain, under the circumstances, whether the obligation even of the common carrier imposed the duty of secretly or openly removing these goods beyond the reach of the sheriff of Santa Fe county, for the mere purpose of avoiding service of writ of attachment. A decent respect for the law, and the process by which it is enforced, whatever may be the character or station to whom it may be applied, is always commendable, and to pursue a course of sharp practice with it under any circumstances cannot be too severely reprehended.

It is contended that there was no valid seizure of the goods. In addition to what transpired on the 16th of March, the evidence shows that the deputy sheriff kept a sort of surveillance over these goods until the morning of the 19th day of April, when he again went to the defendant's agent at Cerillos, as deputy sheriff, and demanded possession of the goods, to which demand the agent opposed a refusal, saying that he wanted to see the sheriff and get his receipt. A few days prior to this, Laughlin had been appointed receiver of Richards & Co. On that same day, and a few hours after, the sheriff, in person, together with Laughlin, went to the agent and demanded possession of the goods, paid the freight, and, turning to Laughlin, told him to go and get the goods. The agent went with the deputy, opened the car, and said to him, "Here are the goods." Laughlin obtained permission to leave the goods in the car, went away, and, for want of a team that day, came back the next and took away the goods. There is no color for saying these acts did not constitute a valid seizure under the writs of attachment. The most scrupulous precaution had been taken by the agent to deliver these goods to Laughlin in his character of deputy sheriff. That the sheriff should permit him (Laughlin) to take the goods as receiver, cannot alter the situation of the defendant so as to make it liable for a wrongful delivery in obedience to legal process.

A more difficult question to be decided is as to the notice which plaintiffs had or ought to have had of the seizure of these goods under the attachment. In *Stiles v. Davis*, 1 Black, 107, a leading

case in this branch of the law, nothing is said about the necessity of giving the owner notice of the seizure. The court decides that seizure under legal process of goods or the property of a third person constitutes a good defence to an action by the true owner, and says that the remedy pursued in that case, an action of trover, was a mistaken one; that the officer or the plaintiffs in the attachment suits directing the levy were the proper parties to have been sued. The language of the court is so broad and sweeping in its declaration of legal principles applicable to this class of cases, that there seems to have been left no room for introducing a lack of notice to the owner of the seizure, as a fact that would modify the principle therein announced; and were it not that courts of the highest respectability have confined the rulings in that case as applying only to actions of trover, and not when the suit is brought on the contract of carriage, we should be inclined to hold, upon that decision, that seizure under legal process constituted a valid defence, with or without notice thereof to the owner. But it must be admitted there are strong reasons for requiring prompt notice to be given of the seizure of his goods to the owner, especially in a proceeding to which he is not a party, and of which he could have no notice; reasons so cogent, that sound law seems imperatively to require that the owner should have such notice, or that he should be in possession of such knowledge of the danger menacing his property, and under such circumstances as that a mere technical performance of the requirements of the law by the common carrier would not place him in any better situation in relation to his property than the knowledge already possessed by him enabled him to occupy. If property has been seized under legal process, and the owner has timely knowledge thereof, and was as much in a position, by the exercise of ordinary and proper diligence, to protect it as if formal notice had been given, the common carrier may well presume that such diligence will be employed, and thus be excused from the refined and technical observance of the rule as to the notice and kind of notice which, by some decisions, seem to be required. In such case, the negligence and *laches* of the owner, if it do not occasion the loss, so contributes towards it that he should bear the burden of it, and not be heard to attribute it to the fault of another. The rule laid down in *Robinson v. Railroad Co.*, 16 Fed. Rep. 57, is a very stringent one, but, as applied to the facts of that case, none too much so; nor is there anything said by the court in that case which conflicts with the views herein expressed. Knowledge, under certain circumstances, is recognized as fully taking the place of formal notice.

In this case, the first steps towards an attachment had been taken on the 16th day of March. That the agent regarded these goods as attached is quite manifest, and so held the goods subject thereto. On the 4th of April, in answer to an inquiry from Pea-

body, defendant's agent at Atchison, he informed him by letter that the goods were attached by the sheriff. This letter, in the usual course of railroad communication, was transmitted to the various offices along the lines over which the goods had been shipped until it reached Chicago, when it was sent, as it seems from the indorsement thereon by Ripley, the Chicago, Burlington & Quincy agent, to the plaintiffs, who received it not later than the 11th day of April. In contemplation of law, notice is nothing more than the knowledge of a fact, state of facts, or condition of things communicated by one whose duty it is so to do to another, who has the right to receive it, or some interest in receiving it. In this case, the fact which plaintiffs were interested to know was that writs of attachment were in the hands of the sheriff, and their property was menaced or affected in a hostile manner thereby. The question is, were they not, by this letter, coming from defendant's agent, written in the regular line of his duty, transmitted through the proper channels, and which reached them eight or nine days before the final act, dispossessing the defendant of the goods, duly and timely admonished of their jeopardy? Certainly, they were thereby placed in a much better position for the purpose of exercising the proper and necessary care to protect and rescue their property than if, upon the seizure of the same on the 19th of April, the most prompt and formal notice had been given. If these facts do not satisfy the technical requirements of the law of notice as applicable to common carriers in cases of this kind, they do make out such a full and timely knowledge on the part of the plaintiffs of the situation of their goods with reference to the attachment proceedings, and under such circumstances as call for prompt and immediate action in their own behalf, a failure to give which can be designated as negligence and *laches* on their part, and, if loss resulted, to them must attach the blame and consequences. No error appearing in the record, the judgment of the court below is affirmed.

Wilson, J., concurs.

Seizure of Goods under Legal Process Valid Excuse for Non-Delivery.—When goods in the possession of a railroad company are seized by the sheriff in pursuance of due legal process, this will constitute a sufficient excuse for non-delivery. *Bliven v. Railroad*, 36 N. Y. 408; *Burton v. Wilkinson*, 18 Vt. 186; *Savannah, etc., R. Co. v. Wilcox*, 48 Ga. 482; *Ohio, etc., R. R. Co. v. Yohe*, 51 Ind. 181; "The Idaho," 93 U. S. 575; *Van Winkle v. Steamship Co.*, 37 Barb. 122; *Stiles v. Davis*, 1 Black, 101; *Furman v. Chicago, etc., R. Co.*, 6 Am. & Eng. R. R. Cas. 230.

When Seizure is Under Illegal Process, it Constitutes no Excuse for Non-Delivery.—When the process is on any account invalid, the seizure constitutes no excuse for non-delivery. *Edwards v. White Line Transit Co.*, 104 Mass. 159; *Kiff v. Old Colony, etc., R. Co.*, 117 Mass. 591; *Faust v. South Carolina R. Co.*, 8 S. C. 118.

General References.—For a full collection of authorities relative to the right of stoppage *in transitu*, and for authorities holding that such right is not interfered with by the attachment of the goods as the property of the consignee, see *Chicago, B. & Q. R. Co. v. Painter & Sons*, and note, *infra*.

INDEX.

THE mode of citing the American and English Railroad Cases is as follows:
18 Am. & Eng. R. R. Cas.

ACTIONS.

Passenger injured through fault of company may sue in tort and may recover according to principles obtaining in such an action. *Baltimore City Pass. R. Co. v. Kemp et ux*, xviii. 220.

ADMINISTRATORS AND EXECUTORS.

SEE DEATH.

AGENCY AND AGENTS.

When company sells ticket to point beyond its own line, the coupons attached setting forth that they are sold on account of another company, the company selling the tickets acts as agent for other line, and will not be deemed to have contracted to carry passenger through to destination. *Pennsylvania R. Co. v. Connell*, xviii. 889.

AMENDMENT.

Date of summons is not conclusive as to when suit has been brought, as same is amendable. *Alabama Gt. Southern R. Co. v. Hawks*, xviii. 194.

In action against railroad company for non-delivery of cotton shipped in Nov., 1879, and March, 1881, plaintiff cannot so amend his bill of particulars as to aver that cotton was lost "during the cotton season of 1879-1880." *Chicago, St. L. & N. O. R. Co. v. Provine*, xviii. 644.

APPEALS.

Question whether damages are excessive or not is in Illinois question for appellate court of first resort. Judgment of said court will not be reviewed on appeal. *Illinois Central R. Co. v. Frelka*, xviii. 7.

Court will not reverse for error in giving or refusing instructions when it is clear that verdict will be the same on new trial. Otherwise where the case is a close one. *Chicago, B. & Q. R. Co. v. Warner*, xviii. 100.

Writ of error will not lie to Supreme Court of U. S. from decision of Supreme Court of Penna. that mail agent killed by negligence on railroad is not a passenger. *Price et al. v. Pennsylvania R. Co.*, xviii. 278.

When record shows that pleading was found to be untrue, appellate court will not consider whether there was error in overruling demurrer to it. *Bartlett v. Pittsburgh, C. & St. L. R. Co.*, xviii. 549.

Unless there is motion for judgment on jury's answers to interrogatories, notwithstanding general verdict, no question concerning right to such judgment can arise in supreme court. *Bartlett v. Pittsburgh, C. & St. L. R. Co.*, xviii. 549.

APPEALS—Continued.

The particular error upon which granting of new trial in appellate court is relied on must be specifically pointed out. *Bush et al. v. Northern Pacific R. Co.*, xviii. 559.

Transcript of record must show matters at issue. These cannot be supplied by reference to record in another case. *Branch & Pope v. Wilmington & W. R. Co.*, xviii. 621.

BAGGAGE.

Check was issued jointly to two passengers for chest which was lost. They sued jointly, and no motion was made to sever causes of action. Evidence was admitted as to contents of chest without objection. *Held*, that court could properly refuse to charge, that as some of the contents were owned in severalty, there could be no recovery. *Anderson et al. v. Wabash, St. L. & P. R. Co.*, xviii. 377.

When party sues for money shipped in baggage, and also for baggage lost in transit, and statements of petition warrant recovery of money, fact that he did not recover money, and that value of goods lost was not within jurisdiction of court, is no ground for sustaining plea to jurisdiction. *Missouri Pacific R. Co. v. York*, xviii. 623.

Party may place money in trunk shipped as baggage without communicating fact to carrier. *Missouri Pacific R. Co. v. York*, xviii. 623.

Possession of baggage check is evidence against company of receipt of baggage. *Denver, S. P. & P. R. Co. v. Roberts*, xviii. 627.

BELLS.

See SIGNALS.

BILLS OF LADING.

Contract by which carrier undertakes to relieve itself from liability for delay will protect company only against liability for delays not caused by its own negligence. *Chicago & Alton R. Co. v. Dawson*, xviii. 521.

Railroad company contracting with circus proprietor to transport special circus cars under the control of proprietor's servants on regular trains, is not liable as common carrier, and may contract for exemption from liability for damages caused by negligence of its servants. *Coup v. Wabash, St. L. & P. R. Co.*, xviii. 542.

When complaint against common carrier for failure to deliver goods promptly, counts on mere common law liability, and evidence shows that goods were received under special contract in writing, the variance is fatal. *Bartlett v. Pittsburgh, C. & St. L. R. Co.*, xviii. 549.

Carrier may, by contract, limit his liability, except for the negligence of his servants. *Bartlett v. Pittsburgh, C. & St. L. R. Co.*, xviii. 549.

When shipper of live-stock assumed, by special contract, all risk of delay in transportation, with full knowledge that there were riots along the line of the road, the railroad company was not liable for delay in transportation caused by such riots. *Bartlett v. Pittsburgh, C. & St. L. R. Co.*, xviii. 549.

Railroad company contracting to carry goods over its own and connecting lines, and to deliver the same at time specified, is liable for delay in transportation beyond its own line. *Pereira v. Central Pacific R. Co.*, xviii. 565.

Whether contract of transportation imposes extra terminal liability is question for jury. Provisions of receipt given by carriers to shipper are not conclusive upon the latter. *Pereira v. Central Pacific R. Co.*, xviii. 565.

When, by terms of bill of lading, undertaking of company is only to deliver goods safely to next carrier of several connecting lines, parol evidence is inadmissible to show undertaking by company to deliver goods safely at their ultimate destination. *Hewitt v. Chicago, B. & Q. R. Co.*, xviii. 568.

BILLS OF LADING—Continued.

Common carrier may by special contract and for a consideration contract for exemption from liability as insurer, upon its own or a connecting line, but cannot contract for exemption from liability for losses occasioned by the negligence of itself or its servants. *Taylor & Co. v. Little Rock, M. R. & T. R. Co.*, xviii. 590.

Stipulation in bill of lading given by one of associated through line of common carriers to effect that if damage to goods is sustained, that company alone in whose custody goods were at time of loss shall be answerable, is reasonable and binding. *Weinburg v. Railroad Co.*, xviii. 597.

When terms of bill of lading leave question in doubt whether company was exempted from liability for loss happening by fire, doubt must be resolved against company. *Little Rock, M. R. & T. R. Co. v. Talbot & Co.*, xviii. 598.

Common carrier may contract for exemption from liability for injuries occurring by unavoidable accident, but cannot contract for exemption from liability for acts occasioned by the negligence of itself or its servants. *Little Rock, M. R. & T. R. Co. v. Talbot & Co.*, xviii. 598.

When carrier is, by terms of bill of lading, exempted from liability for losses occasioned by fire, and goods in transit are destroyed by fire, owner cannot recover unless he proves affirmatively negligence of carrier. *Little Rock, M. R. & T. R. Co. v. Talbot & Co.*, xviii. 598; *Little Rock, M. R. & T. R. Co. v. Corcoran*, xviii. 602.

When valuation is fixed on goods by terms of bill of lading, and freight charges are proportioned to valuation, shipper cannot recover in case of loss more than valuation, although same is attributable to negligence of carrier. *Hart v. Pennsylvania R. Co.*, xviii. 604.

Clause requiring notice of claim for damages for loss of goods to be made within certain time is valid as to contracts to be performed partly without State, but void as to contracts to be performed wholly within State. *Gulf, C. & S. F. R. Co. v. Maetze*, xviii. 613.

When goods are shipped "at owner's own risk," limitation of liability enures to protection of connecting lines. *Kibb v. Atchison, T. & S. F. R. Co.*, xviii. 618.

Clause in bill of lading that goods will be shipped "at convenience of company" will not protect it from liability for unreasonable delay. *Branch & Pope v. Wilmington & W. R. Co.*, xviii. 621.

Delivery to acceptor of draft of unindorsed bill of lading will not transfer title, and carrier is not in such case liable to shipper, should acceptor fail to pay the draft. *Jordan v. Pennsylvania Co.*, xviii. 647.

BOILERS.

Servant using engine with defective boiler in obedience to requirements of officer does not necessarily assume risks of employment, although he knows of defect, when same is not so gross, but that with proper skill and care engine may be safely used. *Sioux City & Pacific R. Co. v. Finlayson*, xviii. 68.

BRAKES.

Company held liable under special circumstances for injury to engineer caused by defective air-brake, though deceased had knowledge of defect. *Kansas City, St. J. & C. B. R. Co. v. Flynn*, xviii. 28.

BRIDGES.

Brakeman on freight train had been warned against low bridges by officer of company. He was also warned by fellow servant of bridge which train was approaching. He was struck by bridge and killed. *Held*, that there could be no recovery, as he had assumed the risk and had been guilty of contributory negligence. *Clark, Adm'r, v. Richmond & D. R. Co.*, xviii. 78.

BRIDGES—Continued.

Company not liable for injury to servant caused by falling through bridge while walking thereon in discharge of his duty to ascertain cause of stoppage of train, the bridge being sufficient to allow safe passage of trains and the company having no reason to expect that it would be used by servants. *Koontz v. Chicago, R. L. & P. R. Co.*, xviii. 85.

CANCER.

Jury may consider whether cancer was or was not proximate result of accident. If it was, damages are recoverable, notwithstanding plaintiff had tendency or predisposition to cancer. *Baltimore City Pass. R. Co. v. Kemp et ux*, xviii. 220.

CARRIERS.

See BAGGAGE; BILLS OF LADING; CONNECTING LINES; EXPRESS COMPANIES; PASSENGERS.

EXCESSIVE FREIGHT CHARGES AND DISCRIMINATIONS.

A railroad company, having purchased the road of another company, received a charter conditionally upon its payment to the State of the debts of the purchased road. The charter gave the company the right to fix and regulate its freights and fare. *Held*, that a subsequent act fixing the maximum rates of freight and fare was unconstitutional, being a violation of the charter contract. *Illinois Central R. Co. v. Stone et al.*, xviii. 416.

State act regulating rates of freight and fare is unconstitutional as applied to a railroad company incorporated in several States and running therein. Such act so applied is a regulation of inter-State commerce. *Illinois Central R. Co. v. Stone et al.*, xviii. 416.

Law of State fixing maximum rate of freight is void as applied to transportation of freight from one State to another, being a regulation of inter-State commerce. *Hardy v. Atchison, T. & S. F. R. Co.*, xviii. 482.

Injunction was issued in this case to compel carrier to receive goods from another for transportation and to collect and account for all freight charges paid by consignee without charge to first carrier. Injunction also required defendant to receive all goods for transportation over plaintiff's lines upon tender by latter of charges. *Baltimore & Ohio R. Co. v. Adams Express Co.*, xviii. 455.

Railroad company charging same rate per ton for transporting coal from group of collieries several miles apart to same destination, is liable to owner of nearest colliery under English statute prohibiting overcharges. *Manchester, S. & L. R. Co. v. Denaby Main Colliery Co.*, xviii. 482.

Under statute of Alabama, railroad company is entitled to charge for local freights at rate of fifty per cent. more than for goods transported from terminus to terminus of road. It is not limited to charge of such extra rate beyond rate charged for goods brought from or carried to point beyond either terminus. *Lotspeich et al. v. Central R. & B. Co. of Ga.*, xviii. 490.

The evidence in this case as to ordinary freight charges for uncompressed cotton, *held*, insufficient to establish an overcharge for compressed cotton. *Lotspeich et al. v. Central R. & B. Co. of Ga.*, xviii. 490.

Whether rates of freight fixed by railroad company for distances less than thirty miles be reasonable or not under Ohio statute is question for jury. *Peters, Ricker & Co. v. Marietta & C. R. Co.*, xviii. 492.

Shipper may recover overcharges paid to procure services of carrier, even though payments are made by arrangement of parties at end of each month. Such payments are not voluntary payments. *Peters, Ricker & Co. v. Marietta & C. R. Co.*, xviii. 492.

CARRIERS—Continued.**DELIVERY TO CARRIER.**

Company held liable as common carrier for goods deposited alongside of platform in its yard, although no receipt was given for such goods, when common custom of company's servants was to consider this a delivery. The fact that the rules of company required a receipt to be given, and that knowledge of the custom was not traced to superintendent of company, made no difference. *Montgomery & Eufaula R. Co. v. Kolb et al.*, xviii. 512.

When railroad company is bound by statute to give receipts for merchandise delivered to it for transportation, its failure to give receipts cannot vary its liability when delivery is satisfactorily shown. *Montgomery & Eufaula R. Co. v. Kolb et al.*, xviii. 512.

When goods are delivered to railroad company to be forwarded immediately, company becomes at once liable as common carrier. If they are to wait further orders of shipper before carriage, company is liable as warehouseman only. *Little Rock & Ft. S. R. Co. v. Hunter*, xviii. 527.

When goods are left at station to be kept until owner proceeds on his journey, and to be returned on request if he should not go, company is not liable except as gratuitous bailee, if liable at all. *Little Rock & Ft. S. R. Co. v. Hunter*, xviii. 527.

When plaintiff had delivered goods for transportation to servant who had frequently shipped goods for her before and who had declared that he had shipped these, *held*, that in case of loss plaintiff was entitled to recover value of goods. *Quarrier v. Baltimore & Ohio R. R. Co.*, xviii. 535.

DUTY OF CONSIGNOR.

Party may place money in trunk without communicating fact to carrier when same is shipped as baggage. But he is guilty of fraud if such trunk is shipped as freight. *Missouri Pacific R. Co. v. York*, xviii. 628.

Consignor of goods is not bound to inform carrier of value if not asked. *Gulf, C. & S. F. R. Co. v. Clark et al.*, xviii. 628.

RIGHTS, DUTIES AND LIABILITIES OF CARRIERS.

Statute of Texas enabling consignee to whom railroad company refuses to deliver goods on tender of charges to recover penalties, is constitutional and valid. *Houston & T. C. R. Co. v. Harry & Bro.*, xviii. 502.

Independent of statute, consignee to whom a railroad company refuses to deliver freight on tender of charges is entitled to recover damages. *Houston & T. C. R. Co. v. Harry & Bro.*, xviii. 502.

Railroad company is bound to transport or haul on its road cars of other companies when requested so to do, and in case of injury to such cars is liable as a common carrier. *Peoria & Pekin Union R. Co. v. Chicago, R. I. & P. R. Co.*, xviii. 506.

Where goods were lost in course of transportation by carrier, charge that it was not necessary to identify the particular goods by marks or brands, but that jury must be satisfied in regard to the particular goods by an average or some other means, is not error when there is evidence tending to show average class, weight and value of goods. *Montgomery & Eufaula R. Co. v. Kolb et al.*, xviii. 512.

Company was held liable for loss of goods by misdelivery, though the road was not regularly open to traffic. *Little Rock, M. R. & T. R. Co. v. Glidewell*, xviii. 539.

Railroad company is liable in case of misdelivery whether same occurs by mistake or through fraud. *Little Rock, M. R. & T. R. Co. v. Glidewell*, xviii. 539.

Custom of company concerning contracts as to transportation of grain will not operate as to parties in ignorance of custom. *Atchison & N. R. Co. v. Miller*, xviii. 545.

When carrier agrees to carry goods at certain rate, he is bound by his contract, and cannot retain out of proceeds of goods when sold a larger sum. *Atchison & N. R. Co. v. Miller*, xviii. 545.

CARRIERS—Continued.

In this case there was evidence to go to jury of shortage in amount of grain delivered by carrier. *Bush et al. v. Northern Pacific R. Co.*, xviii. 559.

Company receiving freight defectively addressed waives right to plead such defect as excuse for non-delivery. *Gulf, C. & S. F. R. Co. v. Maetze*, xviii. 613.

Consignee, though not bound so to do, may accept goods at other point than destination. *Gulf, C. & S. F. R. Co. v. Clark et al.*, xviii. 628.

Carrier is liable for non-delivery at destination of goods damaged by act of God. *Gulf, C. & S. F. R. Co. v. Clark et al.*, xviii. 628.

Question of tender of freight at any other point than destination is for the court and not for the jury. *Gulf, C. & S. F. R. Co. v. Clark et al.*, xviii. 628.

In action against carrier for failure to deliver goods at destination, evidence as to value at point of shipment is relative in estimating damages. *South & North Ala. R. Co. v. Wood*, xviii. 634.

When, in action for non-delivery of goods, company pleads it never received them, proof of non-delivery need not be made. *Hot Springs R. Co. v. Hudgins*, xviii. 643.

In action for non-delivery it is not sufficient for plaintiff to show that goods marked with his initials were delivered to consignee as property of another consignor. *Chicago, St. L. & N. O. R. Co. v. Provine*, xviii. 644.

Delivery to acceptor of draft of unindorsed bill of lading will not transfer title, and carrier is not in such case liable to shipper, should acceptor fail to pay the draft. *Jordan v. Pennsylvania Co.* xviii. 647.

When railroad company upon notice to stop goods *in transitu* holds them for owner, it does not become party to new contract of carriage by subsequent order of owner to ship them to other person or place. *MacVeagh et al. v. Atchison, T. & S. F. R. Co.*, xviii. 651.

When goods in hands of railroad company are seized by legal process, and owner has timely notice, company is not responsible for their loss. *MacVeagh et al. v. Atchison, T. & S. F. R. Co.*, xviii. 651.

Railroad company is not bound to remove goods committed to it to prevent their being subjected to attachment levy. *MacVeagh et al. v. Atchison, T. & S. F. R. Co.*, xviii. 651.

DELAYS.

Company only obliged to provide sufficient facilities for such freight as it may reasonably expect to be offered. It is not bound to provide for any extraordinary influx of business. *Chicago & Alton R. Co. v. Dawson*, xviii. 521.

Company receiving goods for transportation without specific agreement to contrary, undertakes to carry them in reasonable time, regardless of any extraordinary press of business. *Chicago & Alton R. Co. v. Dawson*, xviii. 521.

Instruction to effect that railroad company was bound to forward apples the same day they were received, and permitting no excuse whatever for delay, is erroneous. *Dixon v. Chicago, R. I. & P. R. Co.*, xviii. 525.

Company is not bound to have cars ready for shipment of live-stock on same day that shipper notifies them of intent to forward live-stock, unless notice is proved to be reasonable, or that custom of company is to furnish cars on such notice. *Richardson v. Chicago & N. W. R. Co.*, xviii. 530.

Delay of seventy days in transportation of freight is unreasonable, and company must respond in damages. *St. Louis, I. Mt. & S. R. Co. v. Heath*, xviii. 557.

When, by reason of non-delivery of goods within reasonable time, consignee is obliged to purchase other goods, he is not compelled to receive the goods when afterwards offered. *Gulf, C. & S. F. R. Co. v. Maetze*, xviii. 613.

CARRIERS—Continued.

When carrier failed to forward goods promptly, and in consequence they were attached, *held*, that he was not liable, as his negligence was remote and not proximate cause of injury. *MacVeagh et al. v. Atchison, T. & S. F. R. Co.*, xviii. 651.

CONTRACTS LIMITING LIABILITY.

Company accepting charter as common carrier cannot by contract with other company exempt itself from liability as common carrier. *Wabash, St. L. & P. R. Co. v. Peyton*, xviii. 1.

Contract by which carrier undertakes to relieve itself from liability for delay will protect company only against liability for delays not caused by its own negligence. *Chicago & Alton R. Co. v. Dawson*, xviii. 521.

Railroad company contracting with circus proprietor to transport special circus cars under the control of proprietor's servants on regular trains is not liable as common carrier, and may contract for exemption from liability for damages caused by negligence of its servants. *Coup v. Wabash, St. L. & P. R. Co.*, xviii. 542.

When complaint against common carrier for failure to deliver goods promptly counts on mere common law liability, and evidence shows that goods were received under special contract in writing, the variance is fatal. *Bartlett v. Pittsburgh, C. & St. L. R. Co.*, xviii. 549.

When shipper of live-stock assumed by special contract all risk of delay in transportation with full knowledge that there were riots along the line of the road, the railroad company was not liable for delay in transportation caused by such riots. *Bartlett v. Pittsburgh, C. & St. L. R. Co.*, xviii. 549.

Carrier may by contract limit his liability except for the negligence of his servants. *Bartlett v. Pittsburgh, C. & St. L. R. Co.*, xviii. 549.

Common carrier may, by special contract and for a consideration, contract for exemption from liability as insurer upon its own or connecting line, but cannot contract for exemption from liability for losses occasioned by the negligence of itself or its servants. *Taylor & Co. v. Little Rock, M. R. & T. R. Co.*, xviii. 590.

Stipulation in bill of lading given by one of associated through line of common carriers to effect that if damage to goods is sustained, that company alone in whose custody goods were at time of loss shall be answerable, is reasonable and binding. *Weinburg v. Railroad Co.*, xviii. 597.

When terms of bill of lading leave question in doubt whether company was exempted from liability for loss happening by fire, doubt must be resolved against company. *Little Rock, M. R. & T. R. Co. v. Talbot & Co.*, xviii. 598.

Common carrier may contract for exemption from liability for injuries occurring by unavoidable accident, but cannot contract for exemption from liability for acts occasioned by the negligence of itself or its servants. *Little Rock, M. R. & T. R. Co. v. Talbot & Co.*, xviii. 598.

When carrier is, by terms of bill of lading, exempted from liability for losses occasioned by fire, and goods in transit are destroyed by fire, owner cannot recover unless he proves, affirmatively, negligence of carrier. *Little Rock, M. R. & T. R. Co. v. Talbot & Co.*, xviii. 598; *Little Rock, M. R. & T. R. Co. v. Corcoran*, xviii. 602.

When valuation is fixed on goods by terms of bill of lading and freight charges are proportioned to valuation, shipper cannot recover in case of loss more than valuation, although same is attributable to negligence of carrier. *Hart v. Pennsylvania R. Co.*, xviii. 604.

Clause in contract of shipment requiring notice of claim for damages in certain time when goods are lost is valid as to contracts to be partly performed without State, but is void as to contracts to be performed wholly within State. *Gulf, C. & S. F. R. Co. v. Maetze*, xviii. 618.

When merchandise is shipped "at owner's own risk," the limitation of liability enures to protection of connecting lines. *Kiff v. Atchison, T. & S. F. R. Co.*, xviii. 618.

CARRIERS—Continued.**CONNECTING LINES.**

An injunction was refused in this case to compel carrier to advance accrued charges to carrier receiving goods from plaintiff. But, *semble*, that if this were an established usage, and defendant granted facility to some carriers and refused it to others, injunction would lie to prevent discrimination. *Baltimore & Ohio R. Co. v. Adams Express Co.*, xviii. 455.

Company cannot be compelled to give bill of lading which will render it liable for safe transportation of goods beyond its own line. *Lotspeich et al. v. Central R. & B. Co. of Ga.*, xviii. 490.

In absence of express contract, railroad company is not liable for safe transportation of goods beyond its own line. *Lotspeich v. Central R. & B. Co. of Ga.* xviii. 490.

Association of railroad companies for transportation of through freights and division of receipts in prescribed proportion, does not constitute a partnership nor render companies jointly liable for loss or injury to goods. *Hot Springs Railroad v. Trippe & Co.*, xviii. 562.

Railroad company contracting to carry goods over its own and connecting lines and to deliver the same at time specified, is liable for delay in transportation beyond its own line. *Pereira v. Central Pacific R. Co.*, xviii. 565.

Whether contract of transportation imposes extra terminal liability is question for jury. Provisions of receipt given by carrier to shipper are not conclusive upon the latter. *Pereira v. Central Pacific R. Co.*, xviii. 565.

When railroad company takes property for shipment to point beyond its own line, it is bound to deliver same in reasonable time to next company, but is not liable for negligence of such other company occasioning loss. *Hewitt v. Chicago, B. & Q. R. Co.*, xviii. 568.

When, by terms of bill of lading, undertaking of company is only to deliver goods safely to next carrier of several connecting lines, parol evidence is inadmissible to show undertaking by company to deliver goods safely at their ultimate destination. *Hewitt v. Chicago, B. & Q. R. Co.*, xviii. 568.

Car of potatoes was delayed in cold weather in being transferred from one road to another connecting line. *Held*, that first named company was liable for injury done the potatoes if the delay occurred through its fault. *Hewitt v. Chicago, B. & Q. R. Co.*, xviii. 568.

When car was delivered by one road to another connecting with it on one day and receipt therefor was dated the next, *held*, that evidence was admissible to show custom to that effect. *Hewitt v. Chicago, B. & Q. R. Co.*, xviii. 568.

Carrier is liable for loss of goods in its warehouse awaiting transportation by connecting line, notwithstanding custom that connecting carrier shall inspect books of goods received and take possession of same for transportation. *Condon v. Marquette, H & O. R. Co.*, xviii. 574.

When railroad company stores goods in a warehouse at its terminus owing to inability of connecting line to transport them, and fails to notify shipper of fact, it will be liable for all injury to the goods occasioned by delay, notwithstanding fact that it has assumed no extra terminal liability. *Petersen et al. v. Case, Receiver*, xviii. 578.

It is not duty of common carriers to pay antecedent charges on freight tendered to them by connecting carriers, even where it is customary so to do. *Baltimore & Ohio R. Co. v. Adams Express Co.*, xviii. 586.

Clause in bill of lading that goods will be shipped "at convenience of company" will not protect it from liability for unreasonable delay. *Branch & Pope v. Wilmington & W. R. Co.*, xviii. 621.

JURISDICTION.

In Arkansas, justices of the peace have jurisdiction of suits against railroad companies for delay in transporting goods when damages are less than \$100. Such suits may be in form *ex contractu* or *ex delicto*. *St. Louis, Iron Mt. & S. R. Co. v. Heath*, xviii. 557.

CARRIERS—Continued.

When party sues for money shipped in baggage and also for baggage lost *in transitu*, and statements of petition warrant recovery of money, fact that he did not recover money and that value of goods lost was not within jurisdiction of court, is no ground for sustaining plea to the jurisdiction. *Missouri Pacific R. Co. v. York*, xviii. 623.

PARTIES TO SUIT.

One with whom contract of carriage is made and who is described therein as consignor, consignee and sole owner, may maintain action for overcharge, though he is not owner and did not personally furnish funds to pay overcharge. *Waterman v. Chicago, M. & St. P. R. Co.*, xviii. 456.

Consignee who is purchaser of goods may sue for non-delivery. Where there is doubt as to whether he is purchaser or not, question is for jury. *South & North Al. R. Co. v. Wood*, xviii. 634.

In case of loss of goods, the party in whom entire property is must sue. If both consignor and consignee have interest, either may sue, but recovery by one is bar to action by the other. *Denver, S. P. & P. R. Co. v. Frame*, xviii. 637.

EVIDENCE.

Possession of baggage check is evidence against carrier of receipt of baggage. *Denver, S. P. & P. R. Co.*, xviii. 627.

DAMAGES.

When perishable goods are depreciated by delay in transportation, measure of damages is difference in market value at time when they should have been and time when they are delivered. *Petersen et al. v. Case, Receiver*, xviii. 578.

When carrier lost part of cotton press in transit, only damages recoverable were cost of supplying missing part and fair rental value of press during delay in operation. *Gulf, C. & S. F. R. Co. v. Maetze*, xviii. 613.

Consignor is only entitled to such damages for loss of goods by carrier as latter might reasonably have foreseen would occur. If special circumstances caused special damage, complaint must aver them. *Gulf, C. & S. F. R. Co. v. Maetze*, xviii. 613.

Where there is no evidence as to value of goods lost by carrier, court may refuse a charge limiting right of recovery to value without stating how value is to be ascertained. *Gulf, C. & S. F. R. Co. v. Clark et al.*, xviii. 628.

Measure of damages for loss of goods by carrier is value at destination with interest from the time they should have been delivered. When goods are old, their particular value to owner is measure of damages. *Gulf, C. & S. F. R. Co. v. Clark et al.*, xviii. 628.

CASE, ACTION ON THE.

Merchant has no action against company for notifying servants that they will be discharged if they trade with him. *Payne v. Western R. Co.*, xviii. 119.

CHECKS.

Possession of baggage check is evidence as against carrier of receipt of baggage. *Denver, S. P. & P. R. Co. v. Roberts*, xviii. 627.

CHILDREN.

Company not held liable for killing of lad of eighteen while coupling cars, the evidence showing that he was not inexperienced, and failing to show negligence on the part of the company. *Veits v. Toledo, A. A. & G. T. R. Co.*, xviii. 11.

CIVIL RIGHTS.See **COLORED PERSONS.****COLORED PERSONS.**

Railroad company may provide separate conveyances for white and colored passengers, provided accommodations are equal. *Britton v. Atlanta & C. Air Line R. Co.*, xviii. 891.

COMMON CARRIERS.See **CARRIERS.****CONNECTING LINES.**

Company selling tickets beyond its own line is liable for sure and safe transportation of passenger to destination, notwithstanding clause in ticket limiting company's liability to its own line. *Central R. R. of Ga. v. Combs et al.*, xviii. 298.

Company sold ticket to point beyond destination, part of the route being by steamer. Owing to quarantine, the steamer was taken off after sale of ticket. *Held*, that passenger was not entitled to damages. *Central R. R. of Ga. v. Combs et al.*, xviii. 298.

Railroad company sold ticket to point beyond its own line reached in part by steamer. The steamer had been withdrawn prior to sale of ticket. *Held*, that if passenger could reach destination in another way, he was bound to do so, and could recover extra expense and damages for delay. If he could not, he was entitled to return to point of starting, and could recover his expenses going and returning, and damages for delay. *Central R. R. of Ga. v. Combs et al.*, xviii. 298.

A railroad company in selling tickets beyond its own line acts as agent of the other roads. An action lies by the passenger against such other roads. *Lundy v. Central Pacific R. Co.*, xviii. 309.

When company sells ticket to point beyond its own line, the coupons attached setting forth that they are sold on account of another company, the company selling the tickets acts as agent for other line, and will not be deemed to have contracted to carry passenger through to destination. *Pennsylvania R. Co. v. Connell*, xviii. 839.

An injunction was refused in this case to compel carrier to advance accrued charges to carrier receiving goods from plaintiff. But, *semble*, that if this were an established usage, and defendant granted facility to some carriers and refused it to others, injunction would lie to prevent discrimination. *Baltimore & Ohio R. Co. v. Adams Express Co.*, xviii. 455.

Injunction was issued in this case to compel carrier to receive goods from another for transportation, and to collect and account for all freight charges paid by consignee without charge to first carrier. Injunction also required defendant to receive all goods for transportation over plaintiff's lines upon tender by latter of charges. *Baltimore & Ohio R. Co. v. Adams Express Co.*, xviii. 455.

Company cannot be compelled to give bill of lading which will render it liable for safe transportation of goods beyond its own line. *Lotspeich et al. v. Central R. & B. Co. of Ga.*, xviii. 490.

In absence of express contract, railroad company is not liable for safe transportation of goods beyond its own line. *Lotspeich v. Central R. & B. Co. of Ga.*, xviii. 490.

Railroad company is bound to transport or haul on its road cars of other companies when requested so to do, and in case of injury to such cars, is liable as a common carrier. *Peoria & Pekin Union R. Co. v. Chicago, R. I. & P. R. Co.*, xviii. 506.

Association of railroad companies for transportation of through freights and division of receipts in prescribed proportion, does not constitute a partnership nor render companies jointly liable for loss or injury to goods. *Hot Springs Railroad v. Trippe & Co.*, xviii. 562.

CONNECTING LINES—Continued.

Railroad company contracting to carry goods over its own and connecting lines, and to deliver the same at time specified, is liable for delay in transportation beyond its own line. *Pereira v. Central Pacific R. Co.*, xviii. 565.

Whether contract of transportation imposes extra terminal liability is question for jury. Provisions of receipt given by carrier to shipper are not conclusive upon the latter. *Pereira v. Central Pacific R. Co.*, xviii. 565.

When railroad company takes property for shipment to point beyond its own line, it is bound to deliver same in reasonable time to next company, but is not liable for negligence of such other company occasioning loss. *Hewitt v. Chicago, B. & Q. R. Co.*, xviii. 568.

When, by terms of bill of lading, undertaking of company is only to deliver goods safely to next carrier of several connecting lines, parol evidence is inadmissible to show undertaking by company to deliver goods safely at their ultimate destination. *Hewitt v. Chicago, B. & Q. R. Co.*, xviii. 568.

Car of potatoes was delayed in cold weather in being transferred from one road to another connecting line. *Held*, that first named company was liable for injury done the potatoes if the delay occurred through its fault. *Hewitt v. Chicago, B. & Q. R. Co.*, xviii. 568.

When car was delivered by one road to another connecting with it on one day, and receipt therefor was dated the next, *held*, that evidence was admissible to show custom to that effect. *Hewitt v. Chicago, B. & Q. R. Co.*, xviii. 568.

Carrier is liable for loss of goods in its warehouse awaiting transportation by connecting line, notwithstanding custom that connecting carrier shall inspect books of goods received, and take possession of same for transportation. *Condon v. Marquette, H. & C. R. Co.*, xviii. 574.

When railroad company stores goods in a warehouse at its terminus owing to inability of connecting line to transport them, and fails to notify shipper of fact, it will be liable for all injury to the goods occasioned by delay, notwithstanding fact that it has assumed no extra terminal liability. *Petersen et al. v. Case, Receiver*, xviii. 578.

It is not duty of common carriers to pay antecedent charges on freight tendered to them by connecting carriers, even where it is customary so to do. *Baltimore & Ohio R. Co. v. Adams Express Co.*, xviii. 586.

Stipulation in bill of lading given by one of associated through line of common carriers to effect that if damage to goods is sustained, that company alone in whose custody goods were at time of loss shall be answerable, is reasonable and binding. *Weinburg v. Railroad Co.*, xviii. 597.

When goods are shipped "at owner's own risk," limitation of liability enures to protect all connecting lines. *Kiff v. Atchison, T. & S. F. R. Co.*, xviii. 618.

CONSTITUTIONAL LAW.

A railroad company, having purchased the road of another company, received a charter conditionally upon its payment to the State of the debts of the purchased road. The charter gave the company the right to fix and regulate its freights and fares. *Held*, that a subsequent act fixing the maximum rates of freight and fare was unconstitutional, being a violation of the charter contract. *Illinois Central R. Co. v. Stone et al.*, xviii. 416.

State act regulating rates of freight and fare is unconstitutional as applied to a railroad company incorporated in several States and running therein. Such act so applied is a regulation of inter-State commerce. *Illinois Central R. Co. v. Stone et al.*, xviii. 416.

Law of State fixing maximum rate of freights is void as applied to transportation of freight from one State to another, being a regulation of inter-State commerce. *Hardy v. Atchison, T. & S. F. R. Co.*, xviii. 482.

CONSTITUTIONAL LAW—Continued.

Express company engaged in inter-State commerce has right to carry on business unrestricted by territorial or State restrictions. *Wells, Fargo & Co. v. Northern Pacific R. Co.*, xviii. 440.

If railroad company carrying on business in several States and territories can refuse to express company facilities because latter has not complied with laws of such States and territories as to express companies; *held*, that burden of proof is on railroad company to show non-compliance with such laws. *Wells, Fargo & Co. v. Northern Pacific R. Co.*, xviii. 440.

Sunday laws as applied to railroad company transporting goods from State to State are not void as regulation of inter-State commerce. *State of West Virginia v. Baltimore & Ohio R. Co.*, xviii. 466.

Statute of Texas enabling consignee to whom railroad company refuses to deliver goods on tender of charges to recover penalties is constitutional and valid. *Houston & T. C. R. Co. v. Harry & Bro.*, xviii. 502.

CONTRACTORS.

Company is not liable for wrongful act of contractor in taking trees from land of another to build railroad. *New Orleans & N. E. R. R. Co. v. Reese*, xviii. 110.

When persons employed by contractor are put on pay roll of company and paid by company, they are servants of company, and latter is liable for their torts. *New Orleans & N. E. R. Co. v. Reese*, xviii. 110.

Contractor agreed to finish certain job. He was to be paid what work and material should cost him and a certain per cent. in addition. *Held*, he was not servant of company, so that latter was liable for his tortious acts. *New Orleans & N. E. R. Co. v. Reese*, xviii. 110.

CONTRIBUTORY NEGLIGENCE.

See NEGLIGENCE (CONTRIBUTORY).

COUPLING CARS.

A lad of eighteen was killed while coupling cars. He was not inexperienced and knew of dangerous nature of employment. The evidence failed to show negligence on part of company, which was not held liable accordingly. *Veits v. Toledo, A. A. & G. T. R. Co.*, xviii. 11.

Brakeman coupling cars with draw-bars of unequal height, by direction of conductor or other person, may recover for injury caused thereby. The company is not relieved from liability on ground that the negligence was that of a fellow servant. *Lawless v. Connecticut River R. Co.*, xviii. 96.

When brakeman is injured while coupling cars by reason of draw-bar of engine being too low, company is not entitled to instruction that if that was only defect, there could be no recovery. *Lawless v. Connecticut River R. Co.*, xviii. 96.

Fact that brakeman might see that couplings were of unequal height, does not as matter of law establish negligence on his part in attempting to couple the cars, so as to preclude recovery. *Lawless v. Connecticut River R. Co.*, xviii. 96.

It is contributory negligence for freight conductor to endeavor to pass around end of freight car unprovided with ladders, steps and handles. If he is injured in so doing, he cannot recover. *Chicago, B. & Q. R. Co. v. Warner*, xviii. 100.

CORPORATIONS.

See EXPRESS COMPANIES; FOREIGN CORPORATIONS; INCORPORATION.

CRIMINAL LAW.

Laborers summoned to work on public highways put in as justifiable excuse the fact that they were employed on road-bed of railroad. *Held*, that decision of court below that this was not justifiable excuse would not be overruled. *State of South Carolina v. Hathcock*, xviii. 127.

A passenger in a railway car creating a disturbance was arrested by an officer. *Held*, that the jury might infer from the facts that the arrest was for being drunk, and that the party arrested knew it was for that cause. *Commonwealth of Mass. v. Kennedy*, xviii. 388.

Officer arrested drunken passenger in railroad car, and, while so doing, passenger assaulted him. On trial for the assault, the officer testified that he was sent for to go into the car, and, on cross-examination, stated that he was not in employ of railroad company. *Held*, that, on re-direct examination, he might testify that he was requested by station master to enter the car. *Commonwealth of Mass. v. Kennedy*, xviii. 388.

Railroad company engaged in inter-State commerce may be indicted for a violation of the Sunday laws. *State of West Virginia v. Baltimore & Ohio R. Co.*, xviii. 466.

CUSTOM.

Evidence as to time when companies usually replace certain parts of machinery is immaterial when custom is not shown to have any relation to avoidance of special injury complained of. *Kitteringham v. Sioux City & P. R. Co.*, xviii. 14.

Company is not bound by custom to allow passengers to get on and off moving trains, when they have never done so by invitation or direction of company's servants. *Denver, S. P. & P. R. Co. v. Pickard*, xviii. 284.

Company held liable as common carrier for goods deposited alongside of platform in its yard although no receipt was given for such goods, when common custom of company's servants was to consider this a delivery. The fact that the rules of company required a receipt to be given and that knowledge of the custom was not traced to superintendent of company, made no difference. *Montgomery & Eufaula R. Co. v. Kolb et al.*, xviii. 512.

Custom of company concerning contracts as to transportation of grain will not operate as to parties in ignorance of custom. *Atchison & N. R. Co. v. Miller*, xviii. 545.

When car was delivered by one road to another connecting with it on one day, and receipt therefor was dated the next, *held*, that evidence was admissible to show custom to that effect. *Hewitt v. Chicago, B. & Q. R. Co.*, xviii. 568.

Carrier is liable for loss of goods in its warehouse awaiting transportation by connecting line, notwithstanding custom that connecting carrier shall inspect books of goods received and take possession of same for transportation. *Condon v. Marquette, H. & C. R. Co.*, xviii. 574.

It is not duty of common carriers to pay antecedent charges on freight tendered to them by connecting carriers, even where it is customary so to do. *Baltimore & Ohio R. Co. v. Adams Express Co.*, xviii. 586.

DAMAGES.

See DEATH.

In action for personal injury, damages depend on evidence, and court will not consider whether they are excessive. *Wabash, St. L. & P. R. Co. v. Peyton*, xviii. 1.

Question whether damages are excessive or not is in Illinois for appellate court of first resort. Judgment of said court will not be reviewed on appeal. *Illinois Central R. Co. v. Frelka*, xviii. 7.

Verdict of \$6,250 for injury to spinal column of man of twenty-five held excessive and new trial ordered unless remittitur of \$3,000 was filed. *Sioux City & Pacific R. Co. v. Finlayson*, xviii. 68.

DAMAGES—Continued.

In case of infliction of personal injury, court will confine jury to assessment of such damages as evidence shows to result necessarily from injury complained of. *Chicago, B. & Q. R. Co. v. Warner*, xviii. 100.

When there is evidence that party's arm was crushed and amputated, the jury may infer that he suffered pain and may award damages therefor. *Chicago, B. & Q. R. Co. v. Warner*, xviii. 100.

In case of personal injury instruction is proper that jury may consider all damages present and future which from evidence can be treated as necessary and direct result of injury complained of. *Chicago, B. & Q. R. Co. v. Warner*, xviii. 100.

To justify assessment of damages for future or permanent disability, it must appear that same is reasonably certain to result from injury. *White v. Milwaukee City R. Co.*, xviii. 213.

In suit by husband and wife for personal injuries to the wife, the damages recoverable are only compensation for personal injury sustained by wife. There can be no recovery for inconvenience caused husband. *Baltimore City Pass. R. Co. v. Kemp et ux*, xviii. 220.

When female passenger was carried beyond her station and lost two or three hours' time, and incurred expense of \$1.50 for return conveyance, *held*, that verdict for \$250 damages was excessive. *St. Louis, K. C. & N. R. Co. v. Marshall*, xviii. 248.

When, in action for personal injury, complaint avers only that plaintiff was confined to his bed and suffered painfully from his wounds, there can be no recovery for mental suffering. *International & Gt. N. R. Co. v. Irvine*, xviii. 294.

Railroad company sold ticket to point beyond its own line, reached in part by steamer. The steamer had been withdrawn prior to sale of ticket. *Held*, that if passenger could reach destination in another way, he was bound to do so, and could recover extra expense and damages for delay. If he could not, he was entitled to return to point of starting, and could recover his expenses going and returning, and damages for delay. *Central R. R. of Ga. v. Combs et al.*, xviii. 298.

Passengers in street car gave up tickets. They were transferred *en route* from one car to another, but were not furnished with transfer tickets. Conductor in second car ejected them for failing to produce a ticket. *Held*, that they were entitled to recover exemplary damages. *City & Suburban Ry. of Savannah v. Brauss*, xviii. 324.

When passenger stopping over is, by negligence of conductor, not provided with stop-over ticket, and is required by conductor of subsequent train to pay fare or leave the car, he may elect to leave the car, and may recover all damages resulting naturally and directly from negligence of first conductor. *Yorton v. Milwaukee, L. S. & W. R. Co.*, xviii. 332.

Passenger bought ticket from agent, which he was informed was good. It was not good, having been previously used. Conductor refused to take it, and expelled passenger. *Held*, that if ticket was on its face good, passenger was entitled to exemplary damages, but not if the ticket was bad on its face. *Hubbard v. Grand Rapids, etc., R. Co.*, xviii. 336.

Company issued through ticket over connecting line after it was notified not to do so. Conductor on connecting line refused to receive ticket. *Held*, that passenger could recover damages for breach of contract, but that he could not, by resisting expulsion, entitle himself to recover exemplary damages. *Pennsylvania R. Co. v. Connell*, xviii. 339.

When conductor on train pretended to help invalid passenger to search for ticket, but in reality made no search, being actuated by malicious motives; *held*, that company would be liable in exemplary damages. *Louisville & N. R. Co. v. Fleming*, xviii. 347.

Passenger being given wrong transfer ticket was expelled from car. Court charged that if mistake was owing to negligence of transfer agent, plaintiff could recover damages; that if mistake or expulsion was malicious or wanton, he could recover vindictive damages; and that if conduct of defendant was

DAMAGES—Continued.

wanton, contributory negligence of plaintiff would be no defence. *Held*, that the instructions were as favorable as plaintiff could ask. *Carpenter v. Washington & G. R. Co.*, xviii. 870.

When perishable goods are depreciated by delay in transportation, measure of damages is difference in market value at time when they should have been and time when they are delivered. *Petersen et al. v. Case, Receiver*, xviii. 578.

When carrier lost part of cotton press in transit, only damages recoverable were cost of supplying missing part, and fair rental value of press during delay in its operation. *Gulf, C. & S. F. R. Co. v. Maetze*, xviii. 613.

Consignor is only entitled to such damages for loss of goods as carrier might reasonably have foreseen would occur. *Gulf, C. & S. F. R. Co. v. Maetze*, xxiii. 613.

When there is no evidence as to value of goods lost by carrier, court may refuse charge limiting right of recovery to value, but without stating how value to be ascertained. *Gulf, C. & S. F. R. Co. v. Clark et al.*, xviii. 628.

When carrier loses goods, measure of damages is their value at point of destination, with interest from the time when they should have been delivered. When goods are old, their particular value to owner is measure of damages. *Gulf, C. & S. F. R. Co. v. Clark et al.* xviii. 628.

In action against carrier for loss of goods, evidence of value at point of shipment is admissible as to damages. *South & North Ala. R. Co. v. Wood*, xviii. 634.

When household goods and wearing apparel are lost by carrier, measure of damages is question of law for court. *Denver, S. P. & P. R. Co. v. Frame*, xviii. 637.

DEATH.

By law of Missouri, the measure of damages for causing death is not fixed sum of \$5,000, but a sum not exceeding \$5,000. *Kansas City, St. J. & C. B. R. Co. v. Flynn*, xviii. 23.

Right of action for causing death is given by Sec. 32, not Sec. 2, of Missouri Damage Act. *Kansas City, St. J. & C. B. R. Co. v. Flynn*, xviii. 23.

In action for negligently causing death, it is error to charge jury that they should find as damages fair compensation for pecuniary loss, without making reference to amount of damages sustained. *North Chicago Rolling Mills Co. v. Morrissey, Adm'r*, xviii. 47.

Passenger, induced by negligence of company to believe that train had stopped at station, walked off platform into creek. He was badly hurt, and malaria was developed, which eventually caused his death. *Held*, that negligence of company was so far proximate cause of death as to render company liable in damages therefor. *Terre Haute & Ind. R. R. Co. v. Buck*, xviii. 234.

DECLARATIONS.

See EVIDENCE.

DEPOTS.

See STATIONS.

DERRICK.

In suit for injury caused by use of defective derrick, question what was cause of injury or combination of causes producing it was for jury. *Pullman Palace Car Co. v. Bluhm*, xviii. 87.

DISCRIMINATION.

An injunction was refused in this case to compel carrier to advance accrued charges to carrier receiving goods from plaintiff. But, *semble*, that if this were an established usage, and defendant granted facility to some carriers and refused it to others, injunction would lie to prevent discrimination. *Baltimore & Ohio R. R. Co. v. Adams Express Co.*, xviii. 455.

Railroad company charging same rate per ton for transporting coal from group of collieries several miles apart to same destination is liable to owner of nearest colliery under English statute prohibiting overcharges. *Manchester, S. & L. R. Co. v. Denaby Main Colliery Co.*, xviii. 482.

One with whom contract of carriage is made and who is described therein as consignor, consignee and sole owner may maintain action for overcharge, though he is not owner and did not personally furnish funds to pay overcharge. *Waterman v. Chicago, M. & St. P. R. Co.*, xviii. 486.

DOCTORS.

See **PHYSICIANS.**

ERRORS AND APPEALS.

See **APPEALS.**

ESTOPPEL.

When passenger injured by collision with car of another company releases one company from liability for a compensation, he is estopped to deny that the company released was alone liable, and cannot therefore sue other company. *Tompkins v. Clay Street Hill R. Co. et al.*, xviii. 144.

EVIDENCE.

See **EXPERT.**

Reputable or standard works of science or art are admissible in evidence. *Sioux City & Pacific R. Co. v. Finlayson*, xviii. 68.

Court will not order plaintiff in action for personal injuries to submit his person to physicians nominated by defendant in absence of any showing that justice will be promoted thereby, and especially when plaintiff submits his person to an examination by such physicians in presence of jury. *Sioux City & Pacific R. Co. v. Finlayson*, xviii. 68.

When party's arm is broken and suit is brought to recover damages, evidence is admissible that bones of fracture did not unite and false joint was formed. *Pullman Palace Car Co. v. Bluhm*, xviii. 87.

In case of personal injury, woman nursing plaintiff may testify that at time of sickness he had shown her a piece of bone which he declared he had just taken out of wound. *Pringle v. Chicago, R. I. & P. R. Co.*, xviii. 91.

In case of personal injury evidence is admissible to show that plaintiff limped upon resuming work after the accident. *Pringle v. Chicago, R. I. & P. R. Co.*, xviii. 91.

Court and jury will take notice without proof of fact that loss of an arm impairs party's ability to pursue his ordinary calling. *Chicago, B. & Q. R. Co. v. Warner*, xviii. 100.

When, in notice to take depositions, Christian name of witness is not properly given, deposition is not admissible in evidence. *Patterson v. Wabash, St. L. & P. R. Co.*, xviii. 180.

Facts making it necessary to take deposition must be contained in notice to opposite party, but need not be set out in affidavit. *Patterson v. Wabash, St. L. & P. R. Co.*, xviii. 180.

Before deposition can be put in evidence court must be shown that statutory reason exists for taking it. Affidavit as to such reason served on opposite party constitutes *prima facie* proof. *Patterson v. Wabash, St. L. & P. R. Co.*, xviii. 180.

EVIDENCE—Continued.

Declarations of brakeman after accident that he caused same by misplacing switch are inadmissible when act was not in line of his duty, and declaration was not made in execution of his duty or while act referred to was in progress. *Patterson v. Wabash, St. L. & P. R. Co.*, xviii. 130.

In civil action plaintiff performs his obligation by presenting preponderance of evidence. *New York, L. E. & W. R. Co. v. Seybolt, Adm'x*, xviii. 162.

Conversation between conductor and engineer as to cause of accident taking place after it, is not admissible as part of *res gestæ*. *Alabama Gt. Southern R. Co. v. Hawk*, xviii. 194.

In action for personal injuries court may in proper case at trial direct plaintiff to submit to personal examination by physicians on behalf of defendant. *White v. Milwaukee City R. Co.*, xviii. 213.

Answer of party to his physician in response to inquiry as to how accident occurred is a privileged communication. Physician cannot disclose privileged communications made to his partner in his presence. *Raymond v. Burlington, C. R. & N. R. Co.*, xviii. 217.

When witness was detailing high rate of speed, and, to make meaning clearer, stated exclamation of fellow passenger as to short time consumed in running between stations, *held*, that the evidence was admissible. *Missouri Pacific R. Co. v. Collier*, xviii. 281.

In action for personal injuries, court may in proper case require plaintiff to perform physical act in presence of jury which will show nature and extent of injuries. *Hatfield v. St. Paul & Duluth R. Co.*, xviii. 292.

When uncontradicted evidence showed that party after receiving injury limped when walking, court may refuse to order her to walk in presence of jury. *Hatfield v. St. Paul & Duluth R. Co.*, xviii. 292.

Physician cannot be asked his opinion as to what the result would have been if physician taking up case after he abandoned it had pursued same line of treatment, when such evidence does not go to show that such subsequent treatment rendered injury permanent. *International & Gt. N. R. Co. v. Irvine*, xviii. 294.

When, in action for personal injuries, expert evidence is admitted as to possibility of injurious consequences to plaintiff's health from mere words, expert should be required to take into account all contemporaneous facts that may also conduce to disturbance of health. *Hubbard v. Grand Rapids, etc., R. Co.*, xviii. 336.

Officer arrested drunken passenger in railroad car, and while so doing passenger assaulted him. On trial for the assault the officer testified that he was sent for to go into the car, and on cross-examination stated that he was not in employ of railroad company. *Held*, that, on re-direct examination, he might testify that he was requested by station master to enter the car. *Commonwealth of Mass. v. Kennedy*, xviii. 383.

On trial of indictment against railroad company for violating Sunday laws, train dispatcher may be asked by defendant whether on day in question any other than necessary trains were run. *State of West Virginia v. Baltimore & Ohio R. Co.*, xviii. 466.

When by terms of bill of lading undertaking of company is only to deliver goods safely to next carrier of several connecting lines, parol evidence is inadmissible to show undertaking by company to deliver goods safely at their ultimate destination. *Hewitt v. Chicago, B. & Q. R. Co.*, xviii. 568.

When car was delivered by one road to another connecting with it on one day and receipt was dated the next, *held*, that evidence was admissible to show custom to that effect. *Hewitt v. Chicago, B. & Q. R. Co.*, xviii. 568.

Statements made by clerk or agent not authorized to bind company, as to date of arrival of car at certain point, are not admissible in evidence. *Hewitt v. Chicago, B. & Q. R. Co.*, xviii. 569.

Declarations of station agent not connected with through freight business as to use of cars for that business are not admissible against the company. *Branch & Pope v. Wilmington & W. R. Co.*, xviii. 621.

EVIDENCE—Continued.

Statements contained in bill of exceptions received on former trial are not competent evidence to contradict testimony of witness at subsequent trial. *South & North Ala. R. Co. v. Wood*, xviii. 634.

The limitations under which books of account are admissible in evidence laid down. *Chicago, St. L. & N. O. R. Co. v. Provine*, xviii. 644.

EXCAVATIONS.

Servant of railroad company engaged in excavating dangerous bank was killed by fall thereof. He had been warned of the danger and could have ceased working. *Held*, that he had assumed the risk of his employment and that no recovery could be had for his death. *Simmons, Adm'x, v. Chicago & Tomah R. Co.*, xviii. 50.

Servant had been engaged for some time without objection in excavating earth from dangerous bank. Having been killed while so employed, *held* that he had assumed all risks of his employment and that there could be no recovery for his death. *Rasmusson, Adm'x v. Chicago, R. I. & P. R. Co.*, xviii. 54.

EXECUTION.

When goods in hands of railroad company are seized by legal process and owner has timely notice, company is not responsible for their loss or non-delivery. *McVeagh et al. v. Atchison, T. & S. F. R. Co.*, xviii. 651.

Railroad company is not bound to remove goods committed to it to prevent their being subjected to attachment levy. *MacVeagh et al. v. Atchison, T. & S. F. R. Co.*, xviii. 651.

When carrier failed to forward goods promptly and in consequence they were attached, *held*, that he was not liable, as his negligence was remote and not proximate cause of loss. *McVeagh et al. v. Atchison, T. & S. F. R. Co.*, xviii. 651.

EXPERTS.

When car repairer was injured by poisonous grease accumulated in boxing of car wheels, expert cannot be asked when boxing should have been renewed to prevent such accumulation. He can only be permitted to state results accruing from delay in having such work done. *Kitteringham v. Sioux City & P. R. Co.*, xviii. 14.

Witnesses showing scientific or practical skill and knowledge and experience are competent as experts. The weight to be given to their evidence is for the jury. *Sioux City & Pacific R. Co. v. Finlayson*, xviii. 68.

When written instrument is complete in itself and intelligible, expert evidence is admissible to aid court in reading instrument. *Louisville & Nashville R. Co. v. McKenna and wife*, xviii. 276.

Physician cannot be asked his opinion as to what result would have been if physician taking up case after he had abandoned it had pursued the same line of treatment, when such evidence does not go to show that subsequent treatment rendered injury permanent. *International & Gt. N. R. Co. v. Irvine*, xviii. 294.

When, in action for personal injuries, expert evidence is admitted as to possibility of injurious consequences to plaintiff's health from mere words, expert should be required to take into account all contemporaneous facts that may also conduce to disturbance of health. *Hubbard v. Grand Rapids, etc., R. Co.*, xviii. 336.

EXPRESS COMPANIES.

Corporation created by special law of Colorado to do express business with some of the incidental powers of banking corporation may carry on business in Washington territory. *Wells, Fargo & Co. v. Northern Pacific R. Co.*, xviii. 440.

EXPRESS COMPANIES—Continued.

Carry on industrial pursuit within meaning of laws of U. S. So that they may be authorized by territorial legislatures to transact business. *Wells, Fargo & Co. v. Northern Pac. R. Co.*, xviii. 440.

If railroad company carrying on business in several States and territories can refuse to express company facilities because latter has not complied with laws of such States and territories as to express companies; *held*, that burden of proof is on railroad to show non-compliance with such laws. *Wells, Fargo & Co. v. Northern Pac. R. Co.*, xviii. 440.

Express company engaged in inter-State commerce has right to carry on business unrestricted by territorial or State restrictions. *Wells, Fargo & Co. v. Northern Pac. R. Co.*, xviii. 440.

Court of equity may issue preliminary mandatory injunction to compel railroad company to furnish facilities over its road to express company. *Wells, Fargo & Co. v. Northern Pac. R. Co.*, xviii. 440.

Suits against Adams Express Company must be brought against president or treasurer who are citizens of New York. In suit against company by corporation of State of Maryland, *held*, that United State courts had jurisdiction on ground of difference in citizenship. *Baltimore & Ohio R. Co. v. Adams Express Co.*, xviii. 455.

An injunction was refused in this case to compel carrier to advance accrued charges to carrier receiving goods from plaintiff. But *semble*, that if this were an established usage and defendant granted facility to some carriers and refused it to others, injunction would lie to prevent discrimination. *Baltimore & Ohio R. Co. v. Adams Express Co.*, xviii. 455.

Injunction was issued in this case to compel carrier to receive goods from another for transportation and to collect and account for all freight charges paid by consignee without charge to first carrier. Injunction also required defendant to receive all goods for transportation over plaintiff's lines upon tender by latter of charges. *Baltimore & Ohio R. Co. v. Adams Express Co.*, xviii. 455.

Injunction will be granted to restrain railroad company part of whose line is without the State from interfering with facilities enjoyed by express company, and from refusing to transport express matter and messengers for reasonable compensation over part of road within State. *Fargo v. Redfield et al.*, xviii. 468.

EXPULSION.

See PASSENGERS.

FARES.

See CARRIERS; CONSTITUTIONAL LAW; PASSENGERS; TICKETS.

FIRES.

Railroad company held liable as common carrier for destruction by fire of car of other company in its possession. *Peoria & Pekin Union R. Co. v. Chicago, R. I. & P. R. Co.*, xviii. 506.

FLYING SWITCH.

It was not error to permit plaintiff to describe a "flying switch" when he did not state that the same was the transaction in which the accident occurred, particularly in view of fact that company put in evidence a rule prohibiting servants from making flying switch. *Pringle v. Chicago, R. I. & P. R. Co.*, xviii. 91.

Passenger was injured while in car by violent way in which another car making flying switch was connected with it. In view of evidence, *held* that it was for jury whether or not the use of the flying switch amounted to negligence. *White v. Fitchburg R. Co.*, xviii. 140.

FOREIGN CORPORATIONS.

Corporation created by special law of Colorado to do express business with some of the incidental powers of banking corporation, may carry on business in Washington territory. *Wells, Fargo & Co. v. Northern Pac. R. Co.*, xviii. 440.

FRAUD.

Party shipping trunk as freight is guilty of fraud if he fails to communicate to carrier fact that it contains money. *Aliter*, if the trunk be shipped as baggage. *Missouri Pacific R. Co. v. York*, xviii. 623.

Consignor of goods is not guilty of fraud in failing to inform carrier of value of goods, when not asked to do so. *Gulf, C. & S. F. R. Co. v. Clark et al.*, xviii. 628.

FREE PASS.

See PASS, FREE.

FREIGHTS.

See CARRIERS; CONSTITUTIONAL LAW.

FROGS.

Street railway had two tracks and had frogs placed on each, so as to prevent car going in proper direction from leaving track. Owing to break down of wagon on one track, a car was lifted to the other, and, while running in wrong direction, was derailed, owing to absence of frogs, injuring passenger. *Held*, that there was no evidence of negligence. *White v. Milwaukee City R. Co.*, xviii. 213.

HAMMER.

Section hand was given defective hammer with which to drive spikes. He objected to using it, but was ordered by section boss to do so on pain of losing his place. Being injured by defect, he brought suit against company. *Held*, that he could recover. *East Tenn., Va. & Ga. R. R. Co. v. Duffield*, xviii. 85.

HAND CAR.

Servant on hand car injured by special train cannot recover when he has got upon car voluntarily, knowing that signals have not been shown as required by rules of company. *McGrath v. N. Y. & N. E. R. Co.*, xviii. 5.

HORSE RAILROADS.

See STREET RAILROADS.

HUSBAND AND WIFE.

In suit by husband and wife for personal injuries to the wife, the damages recoverable are only compensation for personal injury sustained by wife. There can be no recovery for inconvenience caused husband. *Baltimore City Pass. R. Co. v. Kemp et ux*, xviii. 220.

When married woman brings suit and fact of coverture does not appear on face of declaration, question of her right to maintain action can be raised by plea only and not by motion to exclude evidence. *Quarrier v. Baltimore & Ohio R. R. Co.*, xviii. 535.

ICE AND SNOW.

Servant at work on track jumped to get out of way of car propelled at immoderate speed. He slipped and fell on ice. *Held*, that it could not be said as matter of law that the rate of speed was not the proximate cause of the accident. *Crowley v. Burlington, C. R. & N. R. Co.*, xviii. 56.

ILLEGAL CONTRACT.

In suit on contract valid on its face, any alleged illegality must be specially pleaded. *Atchison & N. R. Co. v. Miller*, xviii. 545.

INCORPORATION.

Baltimore & Ohio R. R. Co. is domestic corporation of West Virginia. *Quarrier v. Baltimore & Ohio R. R. Co.*, xviii. 585.

INDICTMENT.

See CRIMINAL LAW.

INJUNCTION.

In application for preliminary injunction, when evidence is conflicting, court must decide according to weight of evidence. *Wells, Fargo & Co. v. Northern Pac. R. Co.*, xviii. 440.

Application for preliminary injunction should not be refused on ground of delay, when same has not prejudiced defendant. *Wells, Fargo & Co. v. Northern Pac. R. Co.*, xviii. 440.

Court of equity may issue preliminary mandatory injunction to compel railroad company to furnish facilities over its road to express company. *Wells, Fargo & Co. v. Northern Pac. R. Co.*, xviii. 440.

An injunction was refused in this case to compel carrier to advance accrued charges to carrier receiving goods from plaintiff. But, *semble*, that if this were an established usage, and defendant granted facility to some carriers and refused it to others, injunction would lie to prevent discrimination. *Baltimore & Ohio R. Co. v. Adams Express Co.*, xviii. 455.

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Injunction will be granted to restrain railroad company, part of whose line is without the State, from interfering with facilities enjoyed by express company, and from refusing to transport express matter and messengers for reasonable compensation over part of road within State. *Fargo v. Redfield et al.*, xviii. 463.

INTEREST.

Interest runs from date of judgment and not from date of verdict. *Quarrier v. Baltimore & Ohio R. R. Co.*, xviii. 585.

JURISDICTION.

Writ of error will not lie to Supreme Court of U. S. from decision of Supreme Court of Penna., that mail agent killed by negligence on railroad is not a passenger. *Price et al. v. Pennsylvania R. Co.*, xviii. 273.

Suits against Adams Express Co. must be brought against president or treasurer, who are citizens of New York. In suit against company by corporation of State of Maryland, *held*, that United States courts had jurisdiction on account of difference in citizenship. *Baltimore & Ohio R. Co. v. Adams Express Co.*, xviii. 455.

In Arkansas, justices of the peace have jurisdiction of suits against railroad companies for delay in transporting goods when damages are less than \$100. Such suits may be in form *ex contractu* or *ex delicto*. *St. Louis, Iron Mt. & S. R. Co. v. Heath*, xviii. 557.

When party sues for money shipped in baggage, and also for baggage lost *en transitu*, and statements of petition warrant recovery of money, fact that he did not recover money and that value of goods lost was not within jurisdiction of court, is no ground for sustaining plea to jurisdiction. *Missouri Pacific R. Co. v. York*, xviii. 628.

JUSTICES OF THE PEACE.

In Arkansas, justices of the peace have jurisdiction of suits against railroad companies for delay in transporting goods, when damages are less than \$100. Such suits may be in form *ex contractu* or *ex delicto*. *St. Louis Iron Mt. & S. R. Co. v. Heath*, xviii. 557.

LEASE.

When company runs trains over road of another company, it is liable for injuries to parties caused by defect in track or by negligence of servants of company owning track. *Wabash, St. L. & P. R. Co. v. Peyton*, xviii. 1.

When passenger riding on leased track is injured by negligence of another company also leasing the track, he may maintain action against such other company. *Patterson v. Wabash, St. L. & P. R. Co.*, xviii. 130.

LIBEL.

Company may notify its servants that they will be discharged if they trade with a certain merchant. Merchant in such case has no action against company when notice is not libellous. *Payne v. Western R. Co.*, xviii. 119.

LIGHTS.

Company is bound as to its passengers to properly light its stations and the approaches thereto. In this case it was negligent in this respect. *Buene-mann v. St. Paul, M. & M. R. Co.*, xviii. 158.

LIMITATIONS.

In Alabama, action for personal injuries must be brought within one year. Date of summons is not conclusive as to when suit is brought, as same is amendable. *Alabama Gt. Southern R. Co. v. Hawk*, xviii. 194.

Statute of limitations must be specially pleaded or it will be considered to be waived. *Atchison & N. R. Co. v. Miller*, xviii. 545.

LIMITATION OF LIABILITY.

See **BILLS OF LADING.**

MAIL.

Company is not liable for negligent acts of postal clerks or agents on its train in throwing bags from cars so as to inflict personal injuries. *Muster v. Chicago, M. & St. P. R. Co.*, xviii. 113.

When mail bag is thrown from train so as to inflict personal injuries, and same could only have been lawfully in mail car, presumption is that it was thrown by postal agent. *Muster v. Chicago, M. & St. P. R. Co.*, xviii. 113.

When mail bag was usually thrown off train at distance from station, company was not bound to establish regulations to prevent injury to its servants when bag was thrown off at station. *Muster v. Chicago, M. & St. P. R. Co.*, xviii. 113.

Post-office regulations do not require speed of mail train to be slackened at catch stations where cranes are erected for exchange of mails. *Muster v. Chicago, M. & St. P. R. Co.*, xviii. 113.

Fact that train was running past station at rate of thirty or thirty-five miles an hour does not render company liable for injury to servant at station caused by throwing of mail bag from such train. *Muster v. Chicago, M. & St. P. R. Co.*, xviii. 113.

Passenger standing on platform at station may recover from company for injuries occasioned by mail bag thrown from passing train by mail agent in accordance with custom known to company. *Snow v. Fitchburg R. Co.*, xviii. 161.

MAIL—Continued.

Railroad company is liable to mail agent riding upon its trains as a passenger. *New York, L. E. & W. R. Co. v. Seybolt, Adm'x*, xviii. 162.

When mail agent is riding upon pass, endorsement thereon exempting the company from liability in case of injury is illegal and ineffectual. *New York, L. E. & W. R. Co. v. Seybolt, Adm'x*, xviii. 162.

Writ of error will not lie to Supreme Court of U. S. from decision of Supreme Court of Penna., that mail agent killed by negligence on railroad is not a passenger. *Price et al. v. Pennsylvania R. Co.*, xviii. 273.

MALPRACTICE.

When party injured uses reasonable care and precaution in providing suitable nurses and doctors, he may recover for injury caused by unskillfulness or neglect of nurses and doctors. Otherwise if he fails to take reasonable care. *Pullman Palace Car Co. v. Bluhm*, xviii. 87.

MARRIAGE.

See HUSBAND AND WIFE.

MASTER AND SERVANT.

See SERVANTS.

MINORS.

See CHILDREN.

MUNICIPALITY.

See ORDINANCE.

NEGLIGENCE.

See BOILERS, BRAKES, BRIDGES, CANCER, CARRIERS, COUPLING CARS, DERRICK, EXCAVATIONS, FIRES, FLYING SWITCH, FROGS, HAMMER, HAND CAR, LIGHTS, PASSENGERS, PLATFORMS, POISONS, PROXIMATE AND REMOTE CAUSE, SERVANTS, SIGNALS, SIGNBOARDS, SPEED, STATIONS, STREET RAILROADS, TUNNELS, WINDOWS.

When party injured uses reasonable care and precaution in providing suitable nurses and doctors, he may recover for injury caused by unskillfulness or neglect of nurses and doctors. Otherwise if he fails to take reasonable care. *Pullman Palace Car Co. v. Bluhm*, xviii. 87.

Complaint averred that plaintiff was compelled by defendant's servants to jump from moving train and that cars passed over his body, said injuries being caused by negligence of defendant's servants. *Held*, that court should order complaint to be amended so as to show specifically by what right plaintiff was on train and what was the negligence complained of. *Pennsylvania Co. v. Dean*, xviii. 188.

NEGLIGENCE (CONTRIBUTORY).

See BOILERS, BRAKES, BRIDGES, CANCER, COUPLING CARS, DERRICK, EXCAVATIONS, FLYING SWITCH, FROGS, HAMMER, HAND CAR, LIGHTS, PASSENGERS, PLATFORMS, POISONS, SERVANTS, SIGNALS, SIGNBOARDS, SPEED, STATIONS, STREET RAILROADS, TRESPASSERS, TUNNELS, WINDOWS.

In Tennessee, when negligence of railroad company is proximate cause of accident, party may recover notwithstanding his contributory negligence, which may, however, go in mitigation of either compensatory or exemplary damages. *Louisville & N. R. Co. v. Fleming*, xviii. 847.

NEGROES.

See COLORED PERSONS.

OFFICERS.

Suits against Adams Express Co. must be brought against president or treasurer, who are citizens of New York. In suit against company by corporation of State of Maryland, *held*, that United States courts had jurisdiction on account of difference in citizenship. *Baltimore & Ohio R. Co. v. Adams Express Co.*, xviii. 455.

ORDINANCE.

City ordinance regulating rate of speed of train was applicable to place where injury was inflicted in this case. *Crowley v. Burlington, C. R. & N. R. Co.*, xviii. 56.

OVERCHARGES.

Railroad company charging same rate per ton for transporting coal from group of collieries several miles apart to same destination, is liable to owner of nearest colliery under English statute prohibiting overcharges. *Manchester, S. & L. R. Co. v. Denaby Main Colliery Co.*, xviii. 482.

One with whom contract of carriage is made, and who is described therein as consignor, consignee and sole owner, may maintain action for overcharge though he is not owner, and did not personally furnish funds to pay overcharge. *Waterman v. Chicago, M. & St. P. R. Co.*, xviii. 486.

Under statute of Alabama, railroad company is entitled to charge for local freights at rate of fifty per cent. more than for goods transported from terminus to terminus of road. It is not limited to charge of such extra rate beyond rate charged for goods brought from or carried to point beyond either terminus. *Lotspeich et al. v. Central R. & B. Co. of Ga.*, xviii. 490.

The evidence in this case as to ordinary freight charges for uncompressed cotton, *held*, insufficient to establish an overcharge for compressed cotton. *Lotspeich et al. v. Central R. & B. Co. of Ga.*, xviii. 490.

Whether rates of freight fixed by railroad company for distances less than thirty miles be reasonable or not under Ohio statute, is question for jury. *Peters, Ricker & Co. v. Marietta, etc., R. Co.*, xviii. 492.

Shipper may recover overcharges paid to procure services of carrier, even though payments are made by arrangement of parties at end of each month. Such payments are not voluntary payments. *Peters, Ricker & Co. v. Marietta, etc., R. Co.*, xviii. 492.

PALACE CARS.

See SLEEPING CARS.

PASS, FREE.

When mail agent is riding upon pass, endorsement thereon exempting the company from liability in case of injury is illegal and ineffectual. *New York, L. E. & W. R. Co. v. Seybolt, Adm'r*, xviii. 162.

PASSENGERS.**WHO IS A PASSENGER.**

Railroad company is liable to mail agent riding upon its trains as a passenger. *New York, L. E. & W. R. Co. v. Seybolt, Adm'r*, xviii. 162.

Writ of error will not lie to Supreme Court of U. S. from decision of Supreme Court of Penna., that mail agent killed by negligence on railroad is not a passenger. *Price et al. v. Pennsylvania R. Co.*, xviii. 278.

COLORED PERSONS.

Railroad company may provide separate but not unequal accommodations for white and colored passengers. *Britton v. Atlanta & G. Air Line R. Co.*, xviii. 391.

PASSENGERS—Continued.**DUTY AND LIABILITY OF COMPANY.**

When passenger riding on leased track is injured by negligence of another company also leasing the track, he may maintain action against such other company. *Patterson v. Wabash, St. L. & P. R. Co.*, xviii. 130.

Passenger was injured while in car by violent way in which another car making flying switch was connected with it. In view of evidence, *held* that it was for jury whether or not the use of the flying switch amounted to negligence. *White v. Fitchburg R. Co.*, xviii. 140.

When passenger in car on side track is injured by manner in which car of another company is connected with it by brakeman of such other company, he may maintain action against company in whose car he is at time of accident. *White v. Fitchburg R. Co.*, xviii. 140.

When passenger in street car is injured by collision with car of another company caused by mutual negligence of drivers, he may recover from either. When he sues both, he may dismiss suit as to either, and if it is proven that one is not guilty of negligence, he may take verdict against the other. *Tompkins v. Clay Street Hill R. Co. et al.*, xviii. 144.

When passenger in street car is injured by collision with car of another company, he cannot recover damages from such other company without proving negligence on its part. *Tompkins v. Clay Street Hill R. Co. et al.*, xviii. 144.

When passenger injured by collision with car of another company releases one company from liability for a compensation, he is estopped to deny that the company released was alone liable, and cannot, therefore, sue other company. *Tompkins v. Clay Street Hill R. Co. et al.*, xviii. 144.

Company is not insurer of safety of passengers, and is not bound to provide for safety of those who are physically or mentally below the ordinary standard. *Renneker v. South Carolina R. Co.*, xviii. 149.

In action against company to recover damages for injuries occasioned by fall of party from platform of car in attempting to enter it while it was in station, *held*, there was no evidence of company's negligence. *Chicago, St. L. & N. O. R. Co. v. Trotter*, xviii. 159.

Passenger standing on platform at station may recover from company for injuries occasioned by mail bag thrown from passing train by mail agent in accordance with custom known to company. *Snow v. Fitchburg R. Co.*, xviii. 161.

In suit by passenger against company for personal injuries, proof that train left track and ran into cars standing on side track constitutes *prima facie* evidence of negligence. *New York, L. E. & W. R. Co. v. Seybolt, Adm'x*, xviii. 162.

When mail agent is riding upon pass, endorsement thereon exempting the company from liability in case of injury is illegal and ineffectual. *New York, L. E. & W. R. Co. v. Seybolt, Adm'x*, xviii. 162.

Party got on train to ride with horses. He had no ticket, and was not entitled to ride. He was acting in good faith, and intended to pay his fare when asked by conductor. An accident occurred and he was injured. *Held*, that company was not liable to him as a passenger. *Gardner v. New Haven & Northampton Co.*, xviii. 170.

When passenger riding on platform of car in accordance with custom on part of company to allow passengers to stand there, is injured by willful act of engineer in starting train with a jerk, company is responsible notwithstanding plaintiff's contributory negligence. In this case evidence did not show that act of engineer was willful. *Indiana, B. & W. R. Co. v. Burdge*, xviii. 192.

Statutory provisions requiring engineer to give signal before approaching stopping-place are not intended for safety of passengers, and failure to sound such signal cannot accordingly be usually taken advantage of by them. *Alabama Gt. Southern R. Co. v. Hawk*, xviii. 194.

Street passenger railway is bound as to its passengers to exercise greatest care in approaching and passing structures in street unreasonably close to track. *Dahlberg v. Minneapolis St. R. Co.*, xviii. 202.

PASSENGERS—Continued.

In case of injury to passenger, in determining whether there is evidence to submit to jury, plaintiff's evidence must be assumed to be true. *Western Maryland R. Co. v. Stanley*, xviii. 206.

In passing through tunnel, lights should be lighted and windows, doors and ventilators closed, but an officer need not be provided for every car, and failure to shut out gas and smoke does not give passenger right of action. *Western Maryland R. Co. v. Stanley*, xviii. 206.

While crowded car was in tunnel passenger rose to shut door, and in so doing was injured. *Held*, that he could recover unless he was guilty of contributory negligence, which was for jury. *Western Maryland R. Co. v. Stanley*, xviii. 206.

Street railway had two tracks and had frogs placed on each so as to prevent cars going in proper direction from leaving track. Owing to breakdown of wagon on one track a car was lifted to the other, and while running in wrong direction was derailed, owing to absence of frogs, injuring passenger. *Held*, that there was no evidence of negligence. *White v. Milwaukee City R. Co.*, xviii. 218.

Passenger in street car was injured by derailment of car occurring while it was crossing bridge at high rate of speed. *Held*, that question whether speed amounted to negligence or not was for jury. *White v. Milwaukee City R. Co.*, xviii. 218.

Carrier of passengers must exercise extraordinary care and caution. *Raymond v. Burlington C. R. & N. R. Co.*, xviii. 217.

Conductor is not bound to wake a sleeping passenger, who is sick, upon the arrival of the train at said passenger's destination. Even if conductor has promised to do so, company is not liable for failure on his part to keep his promise. *Sevier v. Vicksburg & M. R. Co.*, xviii. 245.

Passenger with ticket for way station was told by ticket agent to get on express train, which did not stop at said station. The conductor refused to stop, and carried passenger beyond her destination. In action for damages, *held*, that conductor was not in fault, and that plaintiff should have counted on negligent misdirection of ticket agent. *St. Louis, K. C. & N. R. Co. v. Marshall*, xviii. 248.

An accident having occurred at certain trestle owing to obstruction placed on track, superintendent issued written orders to employes on passenger trains to slow up, run carefully and keep sharp lookout at that trestle, an accident having occurred at that point to passenger train. *Held*, that order required engineer to slow up enough to stop train on short notice, if emergency arose. *Louisville & Nashville R. Co. v. McKenna and wife*, xviii. 276.

Accident occurred to passenger by breaking of rail. Plaintiff contended that fracture was caused by running train at too high rate of speed over worn-out track. Company contended it was caused by cold. *Held*, that evidence was admissible as to general condition of road-bed at and near accident. *Missouri Pacific R. Co. v. Collier*, xviii. 281.

Time-table which purports on its face to be for guidance of servants only, and which reserves to company right to vary trains, and which states that flag stations are designated by star, is not sufficient evidence to show that stations not so designated are advertised to public as regular passenger stations. *Denver, S. P. & P. R. Co. v. Pickard*, xviii. 284.

Company is not bound by custom to allow passengers to get on and off moving trains, when they have never done so by invitation or direction of company's servants. *Denver, S. P. & P. R. Co. v. Pickard*, xviii. 284.

Company is not relieved from liability for injury to passenger by reason of fact that reasonable rules have been adopted to prevent such injuries, when rules have not been enforced, but their observance is left discretionary with passengers. *Britton v. Atlanta & C. Air Line R. Co.*, xviii. 391.

Company left loaded car on switch inclined toward main track, the car being secured in proper way. Car got upon main track, and collision was caused whereby passenger was injured. *Held*, that company was not irresponsible as matter of law, though car could only have got on main track by wrongful act of stranger. *Smith v. New York, S. & W. R. Co.*, xviii. 392.

PASSENGERS—Continued.**INJURIES FROM SERVANTS OR FELLOW PASSENGERS.**

Passenger sued Palace Car Co. for injury occasioned by negligent discharge of pistol by porter. The answer set up that porter received pistol from another passenger for safe keeping in violation of company's rules. *Held*, that the answer was bad on demurrer. *Heenrich v. Pullman P. C. Co.*, xviii. 379.

When servants are changed on passenger train, new men should be informed of every circumstance which may affect safety of passengers. *King et al. v. Ohio & Miss. R. Co.*, xviii. 386.

A drunken and riotous passenger was removed to a rear car. Afterwards conductor and brakeman were changed, and did not give full notice to their successors of the passenger's conduct. Subsequently he shot and killed another passenger. *Held*, that the drunken man should have been confined or put off the train, and that the company was liable for the death. *King et al. v. Ohio & Miss. R. Co.*, xviii. 386.

Railroad company is liable for violence and assault upon passenger by fellow passengers or intruders when same could have been prevented by exercise of proper care on part of company or its servants. *Britton v. Atlanta & C. Air Line R. Co.*, xviii. 391.

DUTY OF PASSENGERS.

Passenger attempting to get upon moving freight car with one hand encumbered with lantern, *held*, guilty of contributory negligence *per se*. *McCorkle v. Chicago, R. I. & P. R. Co.*, xviii. 156.

Name of station was called and train stopped short of station while it was still light. A passenger got up and attempted to alight. As she climbed down the steps the train started and she was injured. *Held*, either that she was negligent herself or the occurrence was accidental. In either event the company was not liable. *Mitchell v. Chicago & G. T. R. Co.*, xviii. 176.

Passenger in train failed to get off at station while train was at rest. He was advised by brakeman to get off quick after train had started. He went out accordingly on platform and stepped down on second or third step. A jerk took place and he was thrown off. *Held*, that he had been guilty of contributory negligence. *Lindsey v. Chicago, R. I. & P. R. Co.*, xviii. 179.

Party attempted to alight from slowly moving train with both hands encumbered. The lower step of car was only eighteen inches from ground. He was injured while so doing. *Held*, that he was not guilty of contributory negligence *per se*. *Cumberland Valley R. Co. v. Maugans*, xviii. 182.

Passenger standing on platform of moving car in violation of rules of company is guilty of contributory negligence and cannot maintain action to recover damages. *Alabama Gt. Southern R. Co. v. Hawk*, xviii. 194.

Passenger while in act of taking seat in street car rested his hand on and partially over base of open window, and same was struck and injured by sewer planks standing near car. *Held*, that question of contributory negligence was for jury. *Dahlberg v. Minneapolis St. R. Co.*, xviii. 202.

While crowded car was in tunnel passenger rose to shut door, and in so doing was injured. *Held*, that he could recover unless he was guilty of contributory negligence, which was for jury. *Western Maryland R. Co. v. Stanley*, xviii. 206.

When passenger is injured in alighting from train, and there is nothing in his conduct to which injury can be attributed, inference of due care may be drawn. *Raymond v. Burlington, C. R. & N. R. Co.*, xviii. 217.

When usual signal for stoppage at passenger's destination is given and train actually stops, court will not hold him guilty of contributory negligence, *per se*, for attempting to alight in the dark. *Terre Haute & Indianapolis R. Co. v. Buck*, xviii. 234.

In Tennessee, when negligence of railroad company is proximate cause of injury to passenger, he may recover damages, notwithstanding his contributory negligence. But the latter may go in mitigation of damages. *Louisville & N. R. Co. v. Fleming*, xviii. 347.

PASSENGERS—Continued.

Passenger is bound to inform himself of all reasonable rules established by company for government and direction of trains, and must conform thereto. *Britton v. Atlanta & C. Air Line R. Co.*, xviii. 391.

INJURIES AT STATIONS.

Person intending to take passage on train fell off station platform at night and was injured. In action for injury court charged that if he was using ordinary care and fell off by stumble, this was not lack of ordinary care, as people had different temperaments. *Held*, that this was error. *Renneker v. South Carolina R. Co.*, xviii. 149.

Company is bound as to its passengers to properly light its stations and approaches thereto. In this case it was negligent in this respect. *Buenemann v. St. Paul, M. & M. R. Co.*, xviii. 153.

Passenger falling off platform in dark in imperfectly lighted station not held guilty of contributory negligence *per se*. *Buenemann v. St. Paul, M. & M. R. Co.*, xviii. 153.

FARES AND TICKETS.

Company selling tickets beyond its own line is liable for sure and safe transportation of passenger to destination, notwithstanding clause in ticket limiting company's liability to its own line. *Central R. R. of Ga. v. Combs et al.*, xviii. 298.

Company sold ticket to point beyond destination, part of the route being by steamer. Owing to quarantine, the steamer was taken off after sale of ticket. *Held*, that passenger was not entitled to damages. *Central R. R. of Ga. v. Combs et al.*, xviii. 298.

Railroad company sold ticket to point beyond its own line, reached in part by steamer. The steamer had been withdrawn prior to sale of ticket. *Held*, that if passenger could reach destination in another way, he was bound to do so, and could recover extra expense and damages for delay. If he could not, he was entitled to return to point of starting, and could recover his expenses going and returning, and damages for delay. *Central R. R. of Ga. v. Combs et al.*, xviii. 298.

Passenger purchasing excursion ticket, good for continuous passage only, cannot ride on train not making whole trip, and may be expelled. *Johnson v. Phila., W. & B. R. R. Co.*, xviii. 304.

A railroad company, in selling tickets beyond its own line, acts as agent of the other roads. An action lies by the passenger against such other roads. *Lundy v. Central Pacific R. Co.*, xviii. 309.

When passenger purchases ticket good if used within a time limited, such ticket is good for a passage begun within time limited. *Lundy v. Central Pacific R. Co.*, xviii. 309.

Passenger bought excursion ticket at reduced rate, good for limited time only. He attempted to ride after expiration of time, and was expelled. *Held*, that he was rightly expelled, and had no right to continue his journey unless he paid fare from starting point. *Pennington v. Phila., W. & B. R. Co.*, xviii. 310.

Railroad excursion ticket contained a clause that it was exchangeable for another good on day and train designated. *Held*, that advertisements of tour were inadmissible to show that passenger was entitled to ride on any later day or train than was designated by ticket. *Howard v. Chicago, St. L. & N. O. R. Co.*, xviii. 313.

Regulation that passengers holding excursion tickets must ride on excursion train and not on regular train, is reasonable and binding. Passengers are bound to take notice of such regulation. *McRae v. Wilmington & W. R. Co.*, xviii. 316.

Passengers bought excursion tickets. By regulations of company they were entitled to ride in excursion train only. Conductor took up tickets, and gave coupons in lieu thereof. *Held*, that passengers could not return by regular train, even at an earlier day than that advertised for excursion to return. *McRae v. Wilmington & W. R. Co.*, xviii. 316.

PASSENGERS—Continued.

When company sells ticket to point beyond its own line, the coupons attached setting forth that they are sold on account of another company, the company selling the tickets acts as an agent for other line, and will not be deemed to have contracted to carry passenger through to destination. *Pennsylvania R. Co. v. Connell*, xviii. 839.

Passengers may be required to exhibit tickets on entering train, and to surrender them to conductor on demand, under penalty of expulsion. *Louisville & N. R. Co. v. Fleming*, xviii. 847.

Conductor is not bound to hear evidence from passenger that he has bought ticket and then lost it, although he has exhibited ticket on entering train. Passenger must either produce ticket or pay his fare. *Louisville & N. R. Co. v. Fleming*, xviii. 847.

EXPULSION.

Passengers in street car gave up tickets. They were transferred *en route* from one car to another, but were not furnished with transfer tickets. Conductor in second car ejected them for failing to produce a ticket. *Held*, that they were entitled to recover exemplary damages. *City & Suburban Ry. of Savannah v. Brauss*, xviii. 824.

When passenger stopping over is by negligence of conductor not provided with stop-over ticket, and is required by conductor of subsequent train to pay fare or leave the cars, he may elect to leave the cars, and may recover all damages resulting naturally and directly from negligence of first conductor. *Yorton v. Milwaukee, L. S. & W. R. Co.*, xviii. 832.

Passenger bought ticket from agent which he was informed was good. It was not good, having been previously used. Conductor refused to take it, and expelled passenger. *Held*, that if ticket was on its face good, passenger was entitled to exemplary damages, but not if the ticket was bad on its face. *Hubbard v. Grand Rapids, etc., R. Co.*, xviii. 836.

Company issued through ticket over connecting line after it was notified not to do so. Conductor on connecting line refused to receive the ticket. *Held*, that passenger could recover damages for breach of contract, but that he could not, by resisting expulsion, entitle himself to recover exemplary damages. *Pennsylvania R. Co. v. Connell*, xviii. 839.

It is not the ordinary duty of a conductor to assist a passenger suffering under physical infirmities to find a lost ticket. If he consents to search, he is not bound to do so except in place indicated by passenger; and if he is in good faith unable to find the ticket, he may expel the passenger, although latter actually had ticket on his person. *Louisville & N. R. Co. v. Fleming*, xviii. 847.

If in above case conductor acted in bad faith and did not make search, though he pretended to do so, the company would be liable in exemplary damages. *Louisville & N. R. Co. v. Fleming*, xviii. 847.

When passenger has mislaid his ticket, conductor is bound to afford him reasonable opportunity to find it, and cannot at once stop train and expel him. Whether or not reasonable opportunity has been given, is for jury. *Hayes v. New York Central & H. R. R. Co.*, xviii. 868.

Conductor should afford passenger failing to pay his fare a chance to go into another car and obtain money from friend. He is not justified in immediately expelling him. *Clark v. Wilmington & W. R. Co.*, xviii. 866.

After train has been stopped in order to expel passenger for non-payment of fare, he is not entitled to ride upon tendering fare to conductor. *Clark v. Wilmington & W. R. Co.*, xviii. 866.

Passenger being given wrong transfer ticket was expelled from car. Court charged that if mistake was owing to negligence of transfer agent, plaintiff could recover damages; that if mistake or expulsion was malicious or wanton, he could recover vindictive damages; and that if conduct of defendant was wanton, contributory negligence of plaintiff would be no defence. *Held*, that the instructions were as favorable as plaintiff could ask. *Carpenter v. Washington & G. R. Co.*, xviii. 870.

PASSENGERS—Continued.

Young woman was in same seat with a little girl, her sister. She produced two tickets, one for herself and one for the father, but none for the child. *Held*, that if the conductor could reasonably infer that the child was under the young woman's care, he was justified in expelling them both for non-payment of fare. *Phila., W. & B. R. Co. v. Hoeflich*, xviii. 373.

In the above case, as the child's father was really responsible for her presence and fare, it was for jury to say whether conductor, knowing there was a man in the party, was not bound to discover his relationship to the child. If he was negligent in this respect, he was not justified in expelling the young woman, and company was liable accordingly. *Phila., W. & B. R. Co. v. Hoeflich*, xviii. 373.

Company is not liable for forcible and deliberate expulsion of passenger, unless conductor acted with malice, oppression or evil intent. *Phila., W. & B. R. Co. v. Hoeflich*, xviii. 373.

PROXIMATE AND REMOTE CAUSE.

Passenger, induced by negligence of company to believe that train had stopped at station, walked off platform into creek. He was badly hurt, and malaria was developed, which eventually caused his death. *Held*, that negligence of company was so far proximate cause of death as to render company liable in damages therefor. *Terre Haute & Ind. R. R. Co. v. Buck*, xviii. 284.

Female passenger was carried past her destination and compelled to walk a distance. In action for damages, *held*, that evidence was admissible to show incidental discomforts of walk, and that sickness was caused thereby. *Cincinnati, H. & I. R. Co. v. Eaton*, xviii. 254.

Passenger who was drunk was carried beyond his destination, and then put off train. He wandered on track, and was killed by another train without fault on part of those in charge thereof. *Held*, that the railroad company was not liable. *McClelland, Adm'r v. Louisville, N. A. & C. R. Co.*, xviii. 260.

Passenger was carried past his destination in the dark, and, on leaving the train, was misinformed by conductor as to proper route to station. He took a different route from that which conductor advised him to take, fell into a culvert and was injured. *Held*, that the company's negligence was not the proximate cause of the injury, and that there could be no recovery. *Lewis v. Flint & P're Marquette R. Co.*, xviii. 263.

Infirm passenger was put off at station nine miles from his destination. He undertook to walk in the cold and snow that distance. He was injured by the walk. *Held*, that if he could have obtained lodging at the station, the company was not liable for his injuries, which could not then be regarded as the proximate result of his expulsion. *Louisville & N. R. Co. v. Fleming*, xviii. 347.

SUNDAY LAWS.

Passenger traveling on Sunday by train authorized to run on that day may recover for injuries occasioned by fault of railroad company. *Smith v. New York, S. & W. R. Co.*, xviii. 399.

DAMAGES.

When female passenger was carried beyond her station and lost two or three hours' time, and incurred expense of \$1.50 for return conveyance; *held*, that verdict for \$250 damages was excessive. *St. Louis, K. C. & N. R. Co. v. Marshall*, xviii. 248.

BAGGAGE.

Check was issued jointly to two passengers for chest which was lost. They sued jointly, and no motion was made to sever causes of action. Evidence was admitted as to contents of chest without objection. *Held*, that court could properly refuse to charge that, as some of the contents were owned in severalty, there could be no recovery. *Anderson et al. v. Wabash, St. L. & P. R. Co.*, xviii. 377.

PASSENGERS—Continued.**STOPPING AT STATIONS.**

Under Tennessee act providing that railroad company shall pay penalty of \$100 upon failure of company during any one trip of passenger train to announce stopping-place, only one penalty can be recovered up to bringing suit. *Parks v. Nashville, C. & St. L. R. Co.*, xviii. 404.

ARRESTS.

A passenger in a railroad car creating a disturbance was arrested by an officer. *Held*, that the jury might infer from the facts that the arrest was for being drunk, and that the party arrested knew it was for that cause. *Commonwealth of Mass. v. Kennedy*, xviii. 383.

Officer arrested drunken passenger in railroad car, and while so doing passenger assaulted him. On trial for the assault, the officer testified that he was sent for to go into the car, and on cross-examination stated that he was not in employ of railroad company. *Held*, that, on re-direct examination, he might testify that he was requested by station master to enter the car. *Commonwealth of Mass. v. Kennedy*, xviii. 383.

PRACTICE.

Passenger injured through fault of company may sue in tort and may recover according to principles obtaining in such an action. *Baltimore City Pass. R. Co. v. Kemp et ux*, xviii. 220.

PARTNERSHIP.

Association of railroad companies for transportation of through freights and division of receipts in specified proportion, does not constitute a partnership nor render companies jointly liable for loss or injury to goods. *Hot Springs Railroad v. Trippe & Co.*, xviii. 562.

PENALTIES.

Under Tennessee act providing that railroad companies shall forfeit and pay penalty of \$100 upon failure of the company during any one trip of passenger cars to announce stopping-place, only one penalty can be recovered up to the bringing of the suit. *Parks v. Nashville, C. & St. L. R. Co.*, xviii. 404.

Statute of Texas, enabling consignee to whom railroad company refuses to deliver goods on tender of charges to recover penalties, is constitutional and valid. *Houston & T. C. R. Co. v. Harry & Bro.*, xviii. 502.

PHYSICIANS.

When party injured used reasonable care and precaution in providing suitable nurses and doctors, he may recover for injury caused by unskillfulness or neglect of nurses and doctors. Otherwise if he fails to take reasonable care. *Pullman Palace Car Co. v. Bluhm*, xviii. 87.

Statement of party to his physician in answer to inquiry as to how accident occurred, is a privileged communication. Physician cannot disclose privileged communication made to his partner in his presence. *Raymond v. Burlington, C. R. & N. R. Co.*, xviii. 217.

Physician cannot be asked his opinion as to what result would have been if physician taking up case after he abandoned it had pursued same line of treatment, when such evidence does not go to show that subsequent treatment rendered injury permanent. *International & Gt. N. R. Co. v. Irvine*, xviii. 294.

PLATFORMS.

Person intending to take passage on train fell off station platform at night and was injured. In action for injury court charged that if he was using ordinary care and fell off by stumble, this was not lack of ordinary care, as people had different temperaments. *Held*, that this was error. *Renneker v. South Carolina R. Co.*, xviii. 149.

PLEADING.

In action for personal injury when complaint charges several acts and omissions on part of defendant, a failure to prove each and all of the alleged acts and omissions will not constitute a variance. *Chicago, B. & Q. R. Co. v. Warner*, xviii. 100.

By pleading general issue, defendant admits sufficiency of declaration and he cannot afterwards question this by motion to exclude evidence. *Chicago, B. & Q. R. Co. v. Warner*, xviii. 100.

Complaint averred that plaintiff was compelled by defendant's servants to jump from moving train and that cars passed over his body, said injuries being caused by negligence of defendant's servants. *Held*, that court should order complaint to be amended so as to show specifically by what right plaintiff was on train and what was the negligence complained of. *Pennsylvania Co. v. Dean*, xviii. 188.

Error in sustaining demurrer to paragraph of pleading is harmless when facts alleged therein are contained in remaining paragraph. *McClelland Adm'r v. Louisville, N. A. & C. R. Co.*, xviii. 260.

When, in action for personal injury, complaint avers only that plaintiff was confined to his bed and suffered painfully from his wounds, there can be no recovery for mental suffering. *International & Gt. N. R. Co. v. Irvine*, xviii. 294.

Check was issued jointly to two passengers for chest which was lost. They sued jointly, and no motion was made to sever causes of action. Evidence was admitted as to contents of chest without objection. *Held*, that court could properly refuse to charge that, as some of the contents were owned in severalty, there could be no recovery. *Anderson et al. v. Wabash, St. L. & P. R. Co.*, xviii. 377.

In suit on contract valid on its face, any alleged illegality must be specially pleaded. *Atchison & N. R. Co. v. Miller*, xviii. 545.

When record shows that pleading was found to be untrue, appellate court will not consider whether there was error in overruling demurrer to it. *Bartlett v. Pittsburgh, C. & St. L. R. Co.*, xviii. 549.

When complaint against common carrier for failure to deliver goods promptly counts on mere common law liability, and evidence shows that goods were received under special contract in writing, the variance is fatal. *Bartlett v. Pittsburgh, C. & St. L. R. Co.*, xviii. 549.

POISONS.

Servant knowing of existence of poisonous grease in boxing of wheels, or who should have known of existence of such grease, is guilty of contributory negligence in undertaking to remove such boxing. *Kitteringham v. Sioux City & P. R. Co.*, xviii. 14.

In such case expert cannot state when boxing should have been removed to prevent accumulation of such grease. He can only state results of delay in having such work done. *Kitteringham v. Sioux City & P. R. Co.*, xviii. 14.

When injury was owing to depraved condition of party's system, company was not liable therefor. *Kitteringham v. Sioux City & P. R. Co.*, xviii. 14.

Company not held liable for accident caused by collection of poisonous grease on boxing of wheel when nothing has ever occurred to suggest danger of such occurrence. *Kitteringham v. Sioux City & P. R. Co.*, xviii. 14.

POST OFFICE.

See MAIL.

PRACTICE.

See ACTIONS; AMENDMENT; APPEALS; CASE; DAMAGES; EVIDENCE; EXPERT; JUSTICE OF THE PEACE; PLEADING; SERVICE OF PROCESS.

An instruction properly stating law but not applicable to theory of plaintiff's case constitutes no ground for reversal. *Kitteringham v. Sioux City & P. R. Co.*, xviii. 14.

Party desiring more specific instructions must call attention of court to the fact by a request for correct instructions. *Sioux City & Pacific R. Co. v. Finlayson*, xviii. 68.

Court should not permit counsel to refer to authorities on margin of instructions submitted to court, and such authorities should, in any event, be erased before instructions are submitted to jury. *Sioux City & Pacific R. Co. v. Finlayson*, xviii. 68.

Fact that authorities were entered on margin of instructions does not warrant reversal unless party is shown to have been prejudiced thereby. *Sioux City & Pacific R. Co. v. Finlayson*, xviii. 68.

Instructions must be construed together, and if, when taken as a whole, they properly state the law, they are sufficient. *Sioux City & Pacific R. Co. v. Finlayson*, xviii. 68.

Objections to depositions on the ground of incompetency or irrelevancy must be reduced to writing and filed before trial, otherwise they will be disregarded. *Sioux City & Pacific R. Co. v. Finlayson*, xviii. 68.

Either party may demur to evidence and court will compel joinder in demurrer unless case is clearly against party demurring, or court is in doubt what facts may reasonably be inferred from evidence demurred to. *Clark's Adm'r v. Richmond & D. R. Co.*, xviii. 78.

Party demurring to evidence admits all that can be reasonably inferred therefrom, and waives all his own evidence contradicting or impeaching the evidence demurred to, and all inferences from his own evidence not directly flowing from it. *Clark's Adm'r v. Richmond & D. R. Co.*, xviii. 78.

Instructions are erroneous when based on a hypothesis as to the facts when there is no evidence as to such hypothesis. *Chicago, B. & Q. R. Co. v. Warner*, xviii. 100.

When there is evidence tending to prove a fact, an instruction that if such fact is not proved, the verdict should be a certain way, is erroneous. *Chicago, B. & Q. R. Co. v. Warner*, xviii. 100.

Whether there is evidence on given point or not is for court and not for jury. *Chicago, B. & Q. R. Co. v. Warner*, xviii. 100.

When in notice to take depositions, Christian name of witness is not properly given, deposition is not admissible in evidence. *Patterson v. Wabash, St. L. & P. R. Co.*, xviii. 130.

Facts making it necessary to take deposition must be contained in notice to opposite party, but need not be set out in affidavit. *Patterson v. Wabash, St. L. & P. R. Co.*, xviii. 130.

Before deposition can be put in evidence, court must be shown that statutory reason exists for taking it. Affidavit as to such reason served on opposite party constitutes *prima facie* proof. *Patterson v. Wabash, St. L. & P. R. Co.*, xviii. 130.

Court will sometimes set aside a first verdict as against weight of evidence, when it would not set aside second similar verdict on same evidence. *Buenemann v. St. Paul, M. & M. R. Co.*, xviii. 153.

Court must determine whether a summons is original or *alias*. It is error to leave the question to the jury. *Alabama Gt. Southern R. Co. v. Hawk*, xviii. 194.

After jury has retired to consult as to verdict, it is too late to ask court to dismiss action. *McClelland Adm'r v. Louisville, N. A. & C. R. Co.*, xviii. 260.

PRACTICE—Continued.

When jury returns into court and asks to have instructions read to them, trial court may rightfully correct an erroneous instruction. *McClelland Adm'r v. Louisville, N. A. & C. R. Co.*, xviii. 260.

Construction of complete and intelligible written instrument is for court and not for jury. *Louisville & Nashville R. Co. v. McKenna and wife*, xviii. 276.

In action for personal injuries, court may in proper case require plaintiff to perform physical act in presence of jury which will show nature and extent of injuries. *Hatfield v. St. Paul & Duluth R. Co.*, xviii. 292.

When uncontradicted evidence showed that party after receiving injury limped when walking, court may refuse to order her to walk in presence of jury. *Hatfield v. St. Paul & Duluth R. Co.*, xviii. 292.

When charge of court states law fully and properly, it is not cause for reversal that points of either side have been declined. *Carpenter v. Washington & G. R. Co.*, xviii. 370.

Charges as to matter of fact of which there is no testimony should be refused. *Montgomery & Eufaula R. Co. v. Kolb et al.* xviii. 512.

When bill of exceptions does not set out all the evidence, court will, on appeal, presume that there was testimony to justify rulings of primary court if, under any state of proof, they would be free from error. *Montgomery & Eufaula R. Co. v. Kolb et al.*, xviii. 512.

Rejection of admissible evidence which it is clear would not have changed result is a harmless error. *Bartlett v. Pittsburgh, C. & St. L. R. Co.*, xviii. 549.

Unless there is motion for judgment on jury's answers to interrogatories, notwithstanding general verdict, no question concerning right to such judgment can arise in supreme court. *Bartlett v. Pittsburgh, C. & St. L. R. Co.*, xviii. 549.

When plaintiff's evidence does not tend to sustain any material issue, demurrer to evidence may be sustained; otherwise case is for jury. *Kiff v. Atchison, T. & S. F. R. Co.*, xviii. 618.

In Texas, on appeal to county court from justice of the peace, judge may deliver charge to jury. *Gulf, C. & S. F. R. Co. v. Clark et al.*, xviii. 628.

When absence of allegation would render declaration demurrable, allegation must be proved as averred, unless its truth is admitted by plea. *Chicago, St. L. & N. O. R. R. Co. v. Provine*, xviii. 644.

PRIVILEGED COMMUNICATIONS.

Statement of party to his physician in answer to inquiry as to how accident occurred is a privileged communication. Physician cannot disclose privileged communication made to his partner in his presence. *Raymond v. Burlington, C. R. & N. R. Co.*, xviii. 217.

PROXIMATE AND REMOTE CAUSE.

Where ordinary cut is aggravated by depraved condition of party's system, party cannot recover if jury finds that injury complained of occurred by reason of impurity of blood. *Kitteringham v. Sioux City & P. R. Co.*, xviii. 14.

Servant at work on track jumped to get out of way of car propelled at immoderate speed. He slipped and fell on ice. *Held*, that it could not be said as matter of law that the rate of speed was not the proximate cause of the accident. *Crowley v. Burlington, C. R. & N. R. Co.*, xviii. 56.

While engineer was running train, the rails spread owing to defect therein. Engineer reversed lever of engine, and in so doing broke his arm. *Held*, that it was for jury to say whether defect in track was or was not cause of accident. *Knapp v. Sioux City & P. R. Co.*, xviii. 60.

When plaintiff's arm was broken and a false joint was formed, it was for the jury to determine whether this was proximately the result of the breaking of the arm or not. *Pullman Palace Car Co. v. Bluhm*, xviii. 87.

PROXIMATE AND REMOTE CAUSE—Continued.

When party injured used reasonable care and precaution in providing suitable nurses and doctors, he may recover for injury caused by unskillfulness or neglect of nurses and doctors. Otherwise, if he fails to take reasonable care. *Pullman Palace Car Co. v. Bluhm*, xviii. 87.

Jury may consider whether cancer was or was not proximate result of accident. If it was, damages are recoverable, notwithstanding plaintiff had tendency or predisposition to cancer. *Baltimore City Pass. R. Co. v. Kemp et ux*, xviii. 220.

Passenger, induced by negligence of company to believe that train had stopped at station, walked off platform into creek. He was badly hurt, and malaria was developed, which eventually caused his death. *Held*, that negligence of company was so far proximate cause of death as to render company liable in damages therefor. *Terre Haute & Ind. R. R. Co. v. Buck*, xviii. 284.

Female passenger was carried past her destination, and compelled to walk a distance. In action for damages, *held*, that evidence was admissible to show incidental discomforts of walk, and that sickness was caused thereby. *Cincinnati, H. & I. R. Co., v. Eaton*, xviii. 254.

Passenger who was drunk was carried beyond his destination and then put off train. He wandered on track, and was killed by another train without fault on part of those in charge thereof. *Held*, that the railroad company was not liable. *McClelland Adm'r v. Louisville, N. A. & C. R. Co.*, xviii. 260.

Passenger was carried past his destination in the dark, and on leaving train was misinformed by conductor as to proper route to station. He took a different route from that which conductor advised him to take, fell into a culvert and was injured. *Held*, that the company's negligence was not the proximate cause of the injury, and that there could be no recovery. *Lewis v. Flint & Péré Marquette R. Co.*, xviii. 263.

Infirm passenger was put off at station nine miles from his destination. He undertook to walk in the cold and snow that distance. He was injured by the walk. *Held*, that if he could have obtained lodging at the station, the company was not liable for his injuries, which could not then be regarded as the proximate result of his expulsion. *Louisville & N. R. Co. v. Fleming*, xviii. 847.

When carrier failed to forward goods promptly, and in consequence they were attached; *held*, that he was not liable, as his negligence was remote and not proximate cause of loss. *MacVeagh et al. v. Atchison, T. & S. F. R. Co.*, xviii. 651.

RELEASE

When passenger injured by collision with car of another company releases one company from liability for a compensation, he is estopped to deny that the company released was alone liable, and cannot therefore sue other company. *Tompkins v. Clay Street Hill R. Co. et al.*, xviii. 144.

REMOVAL OF CAUSES.

Baltimore & Ohio R. R. Co. is domestic corporation of West Virginia. Suit instituted against it by citizen in State court cannot be removed to United States courts. *Quarrier v. Baltimore & Ohio R. R. Co.*, xviii. 585.

State court may refuse to order removal of cause to courts of United States when incomplete bond only is filed without penalty. *Quarrier v. Baltimore & Ohio R. R. Co.*, xviii. 585.

ROADS

See **STREETS AND HIGHWAYS.**

RULES AND REGULATIONS.

When mail bag was usually thrown off train at distance from station, company was not bound to establish regulations to prevent injury to its servants when bag was thrown off at station. *Muster v. Chicago, M. & St. P. R. Co.*, xviii. 113.

Regulation forbidding passengers to stand on platform of moving car is reasonable and valid. When passengers violate such regulation they are guilty of contributory negligence. *Alabama Gt. Southern R. Co. v. Hawk*, xviii. 194.

Regulation that passengers holding excursion tickets must ride on excursion train, and not on regular train, is reasonable and binding. Passengers are bound to take notice of such regulation. *McRae v. Wilmington & W. R. Co.*, xviii. 316.

Passenger may be required to exhibit tickets on entering train and to surrender them to conductor on demand, under penalty of expulsion. *Louisville & N. R. Co. v. Fleming*, xviii. 347.

The reasonableness of rules and regulations is for the court and not for the jury. *Louisville & N. R. Co. v. Fleming*, xviii. 347.

It is duty of company to establish and enforce reasonable rules for government of trains. Passenger is bound to inform himself of such regulations and conform thereto. *Britton v. Atlanta & C. Air Line R. Co.*, xviii. 391.

Company is not relieved from liability for injury to passenger by reason of fact that reasonable rules have been adopted to prevent such injuries, when rules have not been enforced, but their observance is left to discretion of passengers. *Britton v. Atlanta & C. Air Line R. Co.*, xviii. 391.

SERVANTS.**DECLARATIONS.**

Declarations of brakeman after accident that he caused same by misplacing switch are inadmissible when act was not in line of his duty, and declaration was not made in execution of his duty or while act referred to was in progress. *Patterson v. Wabash, St. L. & P. R. Co.*, xviii. 180.

Conversation between conductor and engineer as to cause of accident, taking place after accident, is not admissible as part of *res gestæ*. *Alabama Gt. Southern R. Co. v. Hawk*, xviii. 194.

Conductor is not bound to wake a sleeping passenger, who is sick, upon the arrival of the train at said passenger's destination. Even if conductor has promised to do so, company is not liable for failure on his part to keep his promise. *Sevier v. Vicksburg & M. R. Co.*, xviii. 245.

Statements made by clerk or agent not authorized to bind company, as to date of arrival of car at certain point are not admissible in evidence. *Hewitt v. Chicago, B. & Q. R. Co.*, xviii. 569.

Declarations of station agent as to use of freight cars by company for through freights are not admissible, he not being connected with through freight business. *Branch & Pope v. Wilmington & W. R. Co.*, xviii. 621

TORTS OF SERVANTS.

Company is not liable for wrongful act of contractor in taking trees from land of another to build railroad. *New Orleans & N. E. R. Co. v. Reese*, xviii. 110.

When persons employed by contractor are put on pay roll of company and paid by company, they are servants of company and latter is liable for their torts. *New Orleans & N. E. R. Co. v. Reese*, xviii. 110.

Contractor agreed to finish certain job. He was to be paid what work and material should cost him, and a certain per cent. in addition. *Held*, he was not servant of company, so that latter was liable for his tortious acts. *New Orleans & N. E. R. Co. v. Reese*, xviii. 110.

When mail bag is thrown from train so as to inflict personal injuries, and same could only have been lawfully in mail car, presumption is that it was thrown by postal agent. *Muster v. Chicago, M. & St. P. R. Co.*, xviii. 113.

SERVANTS—Continued.

Company is not liable for negligent acts of postal clerks or agents on its train in throwing bags from cars so as to inflict personal injuries. *Muster v. Chicago, M. & St. P. R. Co.*, xviii. 113.

When mail bag was usually thrown off train at distance from station, company was not bound to establish regulations to prevent injury to its servants when bag was thrown off at station. *Muster v. Chicago, M. & St. P. R. Co.*, xviii. 113.

Fact that train was running past station at rate of thirty or thirty-five miles an hour, does not render company liable for injury to servant at station caused by throwing of mail bag from such train. *Muster v. Chicago, M. & St. P. R. Co.*, xviii. 113.

Passenger standing on platform at station may recover from company for injuries occasioned by mail bag thrown from passing train by mail agent in accordance with custom known to company. *Snow v. Fitchburg R. Co.*, xviii. 161.

When passenger riding on platform of car in accordance with custom on part of company to allow passengers to stand there is injured by willful act of engineer in starting train with a jerk, company is responsible, notwithstanding plaintiff's contributory negligence. In this case evidence did not show that act of engineer was willful. *Indiana, B. & W. R. Co. v. Burdge*, xviii. 192.

Passenger with ticket for way station was told by ticket agent to get on express train, which did not stop at said station. The conductor refused to stop, and carried passenger beyond her destination. In action for damages, *held*, that conductor was not in fault, and that plaintiff should have counted on negligent misdirection of ticket agent. *St. Louis, K. C. & N. R. Co. v. Marshall*, xviii. 248.

When conductor on train pretended to help invalid passenger to search for ticket, but in reality made no search, being actuated by malicious motives; *held*, that company would be liable in exemplary damages. *Louisville & N. R. Co. v. Fleming*, xviii. 347.

Master is liable for acts of servants done contrary to orders, when within scope of his employment. *Heenrich v. Pullman P. C. Co.*, xviii. 379.

Passenger sued Palace Car Co. for injury occasioned by negligent discharge of pistol by porter. The answer set up that porter received pistol from another passenger for safe keeping in violation of company's rules. *Held*, that the answer was bad on demurrer. *Heenrich v. Pullman P. C. Co.*, xviii. 379.

LIABILITY FOR TORTS OF SERVANTS OF ANOTHER COMPANY.

When one company runs trains on road of another, it is liable for accident occasioned by defect in track owing to carelessness of servants of company owning road. *Wabash, St. L. & P. R. Co. v. Peyton*, xviii. 1.

When passenger in car on side track is injured by manuer in which car of another company is connected with it by brakeman of such other company, he may maintain action against company in whose car he is at time of accident. *White v. Fitchburg R. Co.*, xviii. 140.

DUTY OF COMPANY.

When two companies use station jointly, each is bound to the observance of the same care for the safety of the other company's servants about the station as for the safety of its own servants. *Illinois Central R. Co. v. Frelka*, xviii. 7.

Company not held liable for accident occasioned by collection of poisonous grease on boxing of wheel when nothing has ever occurred to suggest danger of such occurrence. *Kitteringham v. Sioux City & P. R. Co.*, xviii. 14.

Servants of company have no right of action when injured by train running through town or village at rate of speed prohibited by statute. *Dowell v. Vicksburg & Meridian R. Co.*, xviii. 42.

SERVANTS—Continued.

Servant at work on track jumped to get out of way of car propelled at immoderate speed. He slipped and fell on ice. *Held*, that it could not be said as matter of law that the rate of speed was not the proximate cause of the accident. *Crowley v. Burlington, C. R. & N. R. Co.*, xviii. 56.

While engineer was running train, the rails spread, owing to their defective condition, so that part of train was thrown from track. Engineer in order to save himself and train reversed lever of engine and in so doing broke his arm. *Held*, that it was for jury to say whether defect in track was or was not cause of accident. *Knapp v. Sioux City & P. R. Co.*, xviii. 60.

Duty of company to servant to provide safe and suitable instruments and means to perform service applies equally in case of employment to make repairs as in any other employment. *Madden v. Minneapolis & St. L. R. Co.*, xviii. 63.

When servant was injured by explosion of boiler and brings suit against company, instruction is correct which directs jury that they must be satisfied that company was operating engine in which boiler was at time of explosion, and that explosion was owing to company's negligence. *Sioux City & Pacific R. Co. v. Finlayson*, xviii. 68.

When court instructs jury that it was duty of railroad company to examine the boilers of its engines and to ascertain and remedy defects "instead of suffering a servant to be exposed to peril of an explosion." *Held*, that clause cited was unnecessary but not prejudicial. *Sioux City & Pacific R. Co. v. Finlayson*, xviii. 68.

Instruction as to company defendant's knowledge of defect in boiler. *Held*, not erroneous as not designating particularly agents by whose knowledge defendant would be held liable, as, when applied to evidence, there could be no mistake as to agents referred to. *Sioux City & Pacific R. Co. v. Finlayson*, xviii. 68.

When brakeman has been warned against low bridges, no recovery can be had for his death caused by a blow on the head from such bridge. *Clark's Adm'r v. Richmond & D. R. Co.*, xviii. 78.

Company not liable for injury to servant caused by falling through bridge while walking thereon in discharge of his duty to ascertain cause of stoppage of train, the bridge being sufficient to allow safe passage of trains, and the company having no reason to expect that it would be used by servants. *Koontz v. Chicago, R. I. & P. R. Co.*, xviii. 85.

In suit for injury caused by use of defective derrick, question what was cause of injury or combination of causes producing it was for jury. *Pullman Palace Car Co. v. Bluhm*, xviii. 87.

Brakeman was employed in switching. He uncoupled car from engine, and thinking latter had stopped, jumped on track in pursuance of his duty. The engine had not stopped and he was hurt. *Held*, that plaintiff could introduce evidence that condition of road-bed was such that he could only alight on track. *Pringle v. Chicago, R. I. & P. R. Co.*, xviii. 91.

When brakeman is injured while coupling cars by reason of draw-bar of engine being too low, company is not entitled to instruction that if that was only defect there could be no recovery. *Lawless v. Connecticut River R. Co.*, xviii. 96.

Where freight conductor was injured by alleged failure of company to provide steps and handles on freight cars, *held*, that it was error for court to draw off attention from main point to a subordinate issue. *Chicago, B. & Q. R. Co. v. Warner*, xviii. 100.

RULES AND REGULATIONS.

It was not error to permit plaintiff to describe a "flying switch," when he did not state that the same was the transaction in which the accident occurred, particularly in view of fact that company had put in evidence a rule prohibiting servants from making flying switch. *Pringle v. Chicago, R. I. & P. R. Co.*, xviii. 91.

SERVANTS—Continued.**MINOR SERVANTS.**

Lad of eighteen was killed while coupling cars. He was fully aware of dangerous nature of employment, and not wholly inexperienced. The evidence failed to show negligence on part of company, which was not held liable accordingly. *Veits v. Toledo, A. A. & G. T. R. Co.*, xviii. 11.

CONTRIBUTORY NEGLIGENCE AND RISKS OF EMPLOYMENT.

Workman on hand-car was killed by special train. No flags were sent out by hand-car men, and rules of company warned such employes that train might be expected in either direction when no signals were shown. *Held*, that party having knowledge of rule had voluntarily assumed risk and that company was not liable. *McGrath v. N. Y. & N. E. R. Co.*, xviii. 5.

Signal board warning persons to keep off tracks at their peril, erected in station used jointly by two companies, is not to be regarded as applying to the servants of either company. *Illinois Central R. Co. v. Frelka*, xviii. 7.

Servant knowing of existence of poisonous grease in boxing of wheels, or who should have known of existence of such grease, is guilty of contributory negligence in undertaking to remove such boxing. *Kitteringham v. Sioux City & P. R. Co.*, xviii. 14.

Car repairer at work under car was killed by another car switched on same track. Company had failed to provide him with flag for danger signal. He had worked for several weeks without flag. *Held*, that he had assumed risk of employment. *O'Rourke v. Union Pacific R. Co.*, xviii. 19.

Servant using machinery with defects of which he has notice, may recover in some cases for injury occasioned thereby when defect is not serious and he continues to use machinery at company's request. *Kansas City, St. J. & C. B. R. Co. v. Flynn*, xviii. 23.

When killed while on duty, law will presume, in absence of contrary evidence, that deceased exercised due care. *Kansas City, St. J. & C. B. R. Co. v. Flynn*, xviii. 23.

Section hand was given defective hammer with which to drive spikes. He objected to using it but was ordered by section boss to do so on pain of losing his place. Being injured by defect, he brought suit against company. *Held*, that he could recover. *East Tenn., Va. & Ga. R. R. Co. v. Duffield*, xviii. 85.

Fact that plaintiff had been in habit of boarding moving trains, or had been seen to do so with impunity on previous occasions, gave him no right to recover. *Dowell v. Vicksburg & Meridian R. Co.*, xviii. 42.

Servant injured while recklessly attempting to board moving train cannot recover, though train was improperly equipped and some of its appliances were defective. *Dowell v. Vicksburg & Meridian R. Co.*, xviii. 42.

When brakeman on train was crushed by alleged negligent construction of wooden wall near track, it is error for court in its charge to entirely disregard the question of contributory negligence when this has been raised and is material. *North Chicago Rolling Mills Co. v. Morrissey, Adm'x*, xviii. 47.

Servant of railroad company engaged in excavating dangerous bank was killed by fall thereof. He had been warned of the danger, and could have ceased working. *Held*, that he had assumed the risk of his employment, and that no recovery could be had for his death. *Simmons' Adm'x v. Chicago & Tomah R. Co.*, xviii. 50.

Servant had been engaged for some time without objection in excavating earth from dangerous bank. Having been killed while so employed, *held*, that he had assumed all risks of his employment, and that there could be no recovery for his death. *Rasmusson, Adm'r, v. Chicago, R. I. & P. R. Co.*, xviii. 54.

Rule requiring persons crossing track to look in both directions for approaching trains, does not apply strictly to employes at work on the track. *Crowley v. Burlington, C. R. & N. R. Co.*, xviii. 56.

SERVANTS—Continued.

Brakeman on gravel train employed in repairing defective roadway, may recover for injuries inflicted by cars running off track in consequence of bad condition of roadway, when plaintiff has not opportunity to discover such defects. *Madden v. Minneapolis & St. L. R. Co.*, xviii. 63.

Servant using engine with defective boiler, in obedience to requirements of officer, does not necessarily assume risks of employment, although he knows of defect, when same is not so gross but that with proper skill and care engine may be safely used. *Sioux City & Pacific R. Co. v. Finlayson*, xviii. 68.

Brakeman was warned by fellow servant to look out for bridge over track. He failed to do so, was struck by bridge and killed. *Held*, that he could not recover as he had been guilty of contributory negligence. *Clark's Adm'r v. Richmond & D. R. Co.*, xviii. 78.

In above case the facts being such that plaintiff might well have presumed that engine had stopped, question of his contributory negligence and of engineer's negligence in running over him was for jury. *Pringle v. Chicago, R. I. & P. R. Co.*, xviii. 91.

Fact that brakeman might see that couplings were of unequal height does not, as matter of law, establish negligence on his part, in attempting to couple the cars, so as to preclude recovery. *Lawless v. Connecticut River R. Co.*, xviii. 96.

It is contributory negligence for freight conductor to endeavor to pass around end of freight car unprovided with ladders, steps and handles. If he is injured in so doing, he cannot recover. *Chicago, B. & Q. R. Co. v. Warner*, xviii. 100.

NEGLIGENCE OF FELLOW SERVANTS.

Brakeman coupling cars with draw-bars of unequal height, by direction of conductor or other person, may recover for injury caused thereby. The company is not relieved from liability on ground that the negligence was that of a fellow servant. *Lawless v. Connecticut River R. Co.*, xviii. 96.

OTHER MATTERS.

Company may notify its servants that they will be discharged if they trade with a certain merchant. No action lies in such case by merchant when notice is not libelous. *Payne v. Western, etc., R. Co.*, xviii. 119.

Laborers summoned to work on public highways, put in as justifiable excuse the fact that they were employed on road-bed of railroad. *Held*, that decision of court below that this was not justifiable excuse, would not be overruled. *State of South Carolina v. Hathcock*, xviii., 127.

SERVICE OF PROCESS.

Service of process on local agent of company leasing the road on which accident happened is sufficient. *Missouri Pac. R. Co. v. Collier*, xviii. 281.

SIGNALS.

Servant on hand-car, failing to show signals, cannot recover for injury occasioned by special train. *McGrath v. N. Y. & N. E. R. Co.*, xviii. 5.

Statutory provisions requiring engineer to give signal before approaching stopping-place, are not intended for safety of passengers, and failure to sound such signals cannot accordingly be usually taken advantage of by them. *Alabama Gt. Southern R. Co. v. Hawk*, xviii. 194.

SIGNBOARDS.

Signboards warning persons to keep off tracks at their peril, erected in station used jointly by two companies, is not to be regarded as applying to servants of either company. *Illinois Central R. Co. v. Frelka*, xviii. 7.

SLEEPING CARS.

Passenger sued Palace Car Co. for injury occasioned by negligent discharge of pistol by porter. The answer set up that porter received pistol from another passenger for safe keeping in violation of company's rules. *Held*, that the answer was bad on demurrer. *Heenrich v. Pullman P. C. Co.*, xviii. 379.

SNOW.

See ICE AND SNOW.

SPEED.

Servants of company have no right of action when injured by train running through town or village at rate of speed prohibited by statute. *Dowell v. Vicksburg & Meridian R. Co.*, xviii. 42.

Servant at work on track jumped to get out of way of car propelled at immoderate speed. He slipped and fell on ice. *Held*, that it could not be said as matter of law that the rate of speed was not the proximate cause of the accident. *Crowley v. Burlington, C. R. & N. R. Co.*, xviii. 46.

City ordinance, regulating rate of speed of train, was applicable to place where injury was inflicted in this case. *Crowley v. Burlington, C. R. & N. R. Co.*, xviii. 56.

Post-office regulations do not require speed of mail train to be slackened at catch stations where cranes are erected for exchange of mails. *Muster v. Chicago, M. & St. P. R. Co.*, xviii. 118.

Fact that train was running past station at rate of thirty or thirty-five miles an hour does not render company liable for injury to servant at station caused by throwing of mail-bag from such train. *Muster v. Chicago, M. & St. P. R. Co.*, xviii. 118.

Passenger in street car was injured by derailment of car, occurring while it was crossing bridge at high rate of speed. *Held*, that question whether speed amounted to negligence or not, was for jury. *White v. Milwaukee City R. Co.*, xviii. 218.

Accident occurred to passenger by breaking of rail. Plaintiff contended that fracture was caused by running train at too high rate of speed over worn-out track. Company contended it was caused by cold. *Held*, that evidence was admissible as to general condition of road-bed at and near accident. *Missouri Pacific R. Co. v. Collier*, xviii. 281.

STATIONS.

When two companies use station jointly, each is bound to the observance of the same care for the safety of the other company's servants about the station as for the safety of its own servants. *Illinois Central R. Co. v. Frelka*, xviii. 7.

When two companies use station jointly, and servants of both companies are required in performance of duties to cross tracks, signal board warning persons to keep off tracks is not to be regarded as applying to servants of either company. *Illinois Central R. Co. v. Frelka*, xviii. 7.

Person intending to take passage on train fell off station platform at night and was injured. In action for injury, court charged that if he was using ordinary care and fell off by stumble, this was not lack of ordinary care, as people had different temperaments. *Held*, that this was error. *Renneker v. South Carolina R. Co.*, xviii. 149.

Company is bound, as to its passengers, to properly light its stations and the approaches thereto. In this case it was negligent in this respect. *Buenemann v. St. Paul, M. & M. R. Co.*, xviii. 153.

When witness was detailing high rate of speed, and, to make meaning clearer, stated exclamation of fellow passenger as to short time consumed in running between stations; *held*, that the evidence was admissible. *Missouri Pac. R. Co. v. Collier*, xviii. 281.

Under Tennessee act providing that railroad company shall pay penalty of \$100 upon failure of company, during any one trip of passenger train, to announce stopping-place, only one penalty can be recovered up to the bringing of suit. *Parks v. Nashville, C. & St. L. R. Co.*, xviii. 404.

STOPPAGE IN TRANSITU.

When railroad company upon notice to stop goods *in transitu* holds them for owner, it does not become party to new contract of carriage by subsequent order of owner to ship them to other person or place. *MacVeagh et al. v. Atchison, T. & S. F. R. Co.*, xviii. 651.

STREETS AND HIGHWAYS.

Laborers summoned to work on public highways put in as justifiable excuse the fact that they were employed on road-bed of railroad. *Held*, that decision of court below that this was not justifiable excuse, would not be overruled. *State of South Carolina v. Hathcock*, xviii. 127.

STREET RAILROADS.

When passenger in street car is injured by collision with car of another company caused by mutual negligence of drivers, he may recover from either. When he sues both, he may dismiss suit as to either, and if it is proven that one is not guilty of negligence, he may take verdict against the other. *Tompkins v. Clay Street Hill R. Co. et al.*, xviii. 144.

When passenger in street car is injured by collision with car of another company, he cannot recover damages from such other company without proving negligence on its part. *Tompkins v. Clay Street Hill R. Co. et al.*, xviii. 144.

When passenger injured by collision with car of another company releases one company from liability for a compensation, he is estopped to deny that the company released was alone liable and cannot therefore sue other company, xviii. 144.

Street passenger railway is bound, as to its passengers, to exercise greatest care in approaching and passing structures in street unreasonably close to track. *Dahlberg v. Minneapolis St. R. Co.*, xviii. 202.

Passenger, while in act of taking seat in street car, rested his hand on and partially over base of open window and same was struck and injured by sewer plank standing near car. *Held*, that question of contributory negligence was for jury. *Dahlberg v. Minneapolis St. R. Co.*, xviii. 202.

Street railway had two tracks and had frogs placed on each, so as to prevent cars going in proper direction from leaving track. Owing to break down of wagon on one track a car was lifted to the other, and while running in wrong direction was derailed, owing to absence of frogs, injuring passenger. *Held*, that there was no evidence of negligence. *White v. Milwaukee City R. Co.*, xviii. 213.

Passenger in street car was injured by derailment of car, occurring while it was crossing bridge at high rate of speed. *Held*, that question whether speed amounted to negligence or not, was for jury. *White v. Milwaukee City R. Co.*, xviii. 213.

SUITS.

See ACTIONS.

SUNDAY LAWS.

Act prohibiting traveling on Sunday does not apply to use of those trains authorized to be run on that day. *Smith v. New York, S. & W. R. Co.*, xviii. 399.

Sunday laws as applied to railroad company transporting goods from State to State are not void as a regulation of inter-State commerce. *State of West Virginia v. Baltimore & Ohio R. Co.*, xviii. 466.

On trial of indictment against railroad company for violating Sunday laws, train despatcher may be asked by defendant whether on day in question any other than necessary trains were run. *State of West Virginia v. Baltimore & Ohio R. Co.*, xviii. 466.

TICKETS,

Passenger with ticket for way station was told by ticket agent to get on express train, which did not stop at said station. The conductor refused to stop, and carried passenger beyond her destination. In action for damages, *Held*, that conductor was not in fault, and that plaintiff should have counted on negligent misdirection of ticket agent. *St. Louis, K. C. & N. R. Co. v. Marshall*, xviii. 248.

Company selling tickets beyond its own line is liable for sure and safe transportation of passenger to destination, notwithstanding clause in ticket limiting company's liability to its own line. *Central R. R. of Ga. v. Combs et al.*, xviii. 298.

Company sold ticket to point beyond destination, part of the route being by steamer. Owing to quarantine the steamer was taken off after sale of ticket. *Held*, that passenger was not entitled to damages. *Central R. R. of Ga. v. Combs et al.*, xviii. 298.

Railroad company sold ticket to point beyond its own line reached in part by steamer. The steamer had been withdrawn prior to sale of ticket. *Held*, that if passenger could reach destination in another way, he was bound to do so, and could recover extra expense and damages for delay. If he could not, he was entitled to return to point of starting, and could recover his expenses going and returning, and damages for delay. *Central R. R. of Ga. v. Combs et al.*, xviii. 298.

Passenger purchasing excursion ticket good for continuous passage only cannot ride on train not making whole trip and may be expelled. *Johnson v. Phila., W. & B. R. R. Co.*, xviii. 804.

When passenger purchases ticket good if used within a time limited, such ticket is good for a passage begun within time limited. *Lundy v. Central Pacific R. Co.*, xviii. 809.

A railroad company selling tickets beyond its own line acts as agent of the other roads. An action lies by the passenger against such other roads. *Lundy v. Central Pacific R. Co.*, xviii. 809.

Passenger bought ticket at reduced rate good for limited time only. He attempted to ride after expiration of time, and was expelled. *Held*, that he was rightly expelled, and had no right to continue his journey unless he paid fare from starting point. *Pennington v. Phila., W. & B. R. Co.*, xviii. 810.

Railroad excursion ticket contained a clause that it was exchangeable for another good on day and train designated. *Held*, that advertisements of tour were inadmissible to show that passenger was entitled to ride on any later day or train than was designated by ticket. *Howard v. Chicago, St. L. & N. O. R. Co.*, xviii. 818.

Regulation that passengers holding excursion tickets must ride on excursion train and not on regular train is reasonable and binding. Passengers are bound to take notice of such regulation. *McRae v. Wilmington & W. R. Co.*, xviii. 816.

Passengers bought excursion tickets. By regulations of company they were entitled to ride in excursion train only. Conductor took up tickets, and gave coupons in lieu thereof. *Held*, that passengers could not return by regular train, even at an earlier day than that advertised for excursion to return. *McRae v. Wilmington & W. R. Co.*, xviii. 816.

Passengers in street car gave up tickets. They were transferred *en route* from one car to another, but were not furnished with transfer tickets. Conductor on second car ejected them for failing to produce a ticket. *Held*, that they were entitled to recover exemplary damages. *City & Suburban Ry. of Savannah v. Brauss*, xviii. 824.

When passenger stopping over is by negligence of conductor not provided with stop-over ticket, and is required by conductor of subsequent train to pay fare or leave the cars, he may elect to leave the cars, and may recover all damages resulting naturally and directly from negligence of first conductor. *Yorton v. Milwaukee, L. S. & W. R. Co.*, xviii. 832.

Passenger bought ticket from agent which he was informed was good. It was not good, having been previously used. Conductor refused to take it,

TICKETS—Continued,

and expelled passenger. *Held*, that if ticket was on its face good, passenger was entitled to exemplary damages, but not if the ticket was bad on its face. *Hubbard v. Grand Rapids, etc., R. Co.*, xviii. 336.

When company sells ticket to point beyond its own line, the coupons attached setting forth that they are sold on account of another company, the company selling the tickets acts as agent for other line, and will not be deemed to have contracted to carry passenger through to destination, *Pennsylvania R. Co. v. Connell*, xviii. 339.

Company issued through ticket over connecting line after it was notified not to do so. Conductor on connecting line refused to receive the ticket. *Held*, that passenger could recover damages for breach of contract, but that he could not, by resisting expulsion, entitle himself to recover exemplary damages. *Pennsylvania R. Co. v. Connell*, xviii. 339.

Passenger may be required to exhibit tickets on entering train and to surrender them to conductor on demand, under penalty of expulsion. *Louisville & N. R. Co. v. Fleming*, xviii. 347.

Conductor is not bound to hear evidence from passenger that he has bought ticket and then lost it, although he has exhibited ticket on entering train. Passenger must either produce ticket or pay his fare. *Louisville & N. R. Co. v. Fleming*, xviii. 347.

It is not the ordinary duty of conductor to assist a passenger suffering under physical infirmities to find a lost ticket. If he consents to search, he is not bound to do so except in place indicated by passenger, and if he is in good faith unable to find the ticket, he may expel the passenger, although latter actually has ticket on his person. *Louisville & N. R. Co. v. Fleming*, xviii. 347.

If in above case conductor acted in bad faith and did not make search, though he pretended to do so, the company would be liable in exemplary damages. *Louisville & N. R. Co. v. Fleming*, xviii. 347.

When passenger has mislaid his ticket, conductor is bound to afford him reasonable opportunity to find it, and cannot at once stop train and expel him. Whether or not reasonable opportunity has been given, is for jury. *Hayes v. New York Central & H. R. R. Co.* xviii. 363.

Passenger being given wrong transfer ticket was expelled from car. Court charged that if mistake was owing to negligence of transfer agent, plaintiff could recover damages; that if mistake or expulsion was malicious or wanton, he could recover vindictive damages; and that if conduct of defendant was wanton, contributory negligence of plaintiff would be no defence. *Held*, that the instructions were as favorable as plaintiff could ask. *Carpenter v. Washington & G. R. Co.*, xviii. 370.

Young woman was in same seat with a little girl, her sister. She produced two tickets, one for herself and one for the father, but none for the child. *Held*, that if the conductor could reasonably infer that the child was under the young woman's care, he was justified in expelling them both for non-payment of fare. *Phila. W. & B. R. Co. v. Hoeflich*, xviii. 373.

In the above case, as the child's father was really responsible for her presence and fare, it was for jury to say whether conductor, knowing there was a man in the party, was not bound to discover his relationship to the child. If he was negligent in this respect, he was not justified in expelling the young woman, and company was liable. *Phila. W. & B. R. Co. v. Hoeflich*, xviii. 373.

TIME TABLES.

Time-table which purports on its face to be for guidance of servants only, and which reserves to company right to vary trains, and which states that flag stations are designated by star, is not sufficient evidence to show that stations not so designated are advertised to public as regular passenger stations. *Denver, S. P. & P. R. Co. v. Pickard*, xviii. 284.

TRESPASSERS.

Passenger who was drunk was carried beyond his destination and then put off train. He wandered on track, and was killed by another train without fault on part of those in charge thereof. *Held*, that the railroad company was not liable. *McClelland Adm'r v. Louisville, N. A. & C. R. Co.*, xviii. 260.

TUNNELS.

In passing through tunnel, lights should be lighted and windows, doors and ventilators closed, but an officer need not be provided for every car, and failure to shut out gas and smoke does not give passengers right of action. *Western Maryland R. Co. v. Stanley*, xviii. 206.

While crowded car was in tunnel, passenger rose to shut door and in so doing was injured. *Held*, that he could recover, unless he was guilty of contributory negligence, which was for jury. *Western Maryland R. Co. v. Stanley*, xviii. 206.

UNITED STATES COURTS.

Writ of error will not lie to Supreme Court of U. S. from decision of Supreme Court of Penna., that mail agent killed by negligence on railroad is not a passenger. *Price et al. v. Pennsylvania R. Co.*, xviii. 273.

Suits against Adams Express Co. must be brought against president or treasurer who are citizens of New York. In suit against company by corporation of State of Maryland, *held*, that United States courts had jurisdiction on account of difference in citizenship. *Baltimore & Ohio R. Co. v. Adams Express Co.*, xviii. 455.

Baltimore & Ohio R. R. Co. is domestic corporation of West Virginia. Suit instituted against it by citizen in State court cannot be removed to United States courts. *Quarrier v. Baltimore & Ohio R. Co.*, xviii. 535.

State courts may refuse to order removal of cause to courts of United States when incomplete bond only is filed without penalty. *Quarrier v. Baltimore & Ohio R. R. Co.*, xviii. 535.

USAGE.

See CUSTOM.

WAIVER.

Company receiving freight defectively addressed waives right to plead defect as excuse for non-delivery. *Gulf, C. & S. F. R. Co. v. Maetze*, xviii. 618.

WAREHOUSEMAN.

When goods are delivered to railroad company to be forwarded immediately, company becomes at once liable as common carrier. If they are to wait further orders of shipper before carriage, company is liable as warehouseman only. *Little Rock & Ft. S. R. Co. v. Hunter*, xviii. 527.

When railroad company stores goods in a warehouse at its terminus owing to inability of connecting line to transport them, and fails to notify shipper of fact, it will be liable for all injury to the goods occasioned by delay, notwithstanding fact that it has assumed no extra terminal liability. *Petersen et al. v. Case, Receiver*, xviii. 578.

Carrier is liable for loss of goods in its warehouse awaiting transportation by connecting line, notwithstanding custom that connecting carrier shall inspect books of goods received and take possession of same for transportation. *Condon v. Marquette, H. & C. R. Co.*, xviii. 574.

WHISTLES.

See SIGNALS.

WINDOWS.

Passenger, while in act of taking seat in street car, rested his hand on and partially over base of open window, and same was struck and injured by sewer plank standing near car. *Held*, that question of contributory negligence was for jury. *Dahlberg v. Minneapolis St. R. Co.*, xviii. 202.

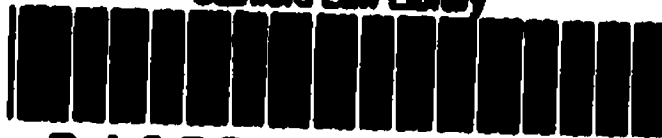
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